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REPORTS
OF
THE DECISIONS OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO,

INCLUDING CASES DETERMINED AT THE SEPTEMBER TERM,
1892, AND THE JANUARY, APRIL AND SEPTEMBER
TERMS, 1893.

T. M. ROBINSON,
REPORTER.

VOL. 3.

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Rec. March 9, 1894.

JUDGES OF THE COURT OF APPEALS
OF THE
STATE OF COLORADO.

GEORGE Q. RICHMOND,¹ PRESIDENT JUDGE.

JULIUS B. BISSELL,
GILBERT B. REED,
CHARLES I. THOMSON, } **JUDGES.**

EUGENE ENGLE, ATTORNEY-GENERAL.

JAMES PERCHARD, CLERK.

T. M. ROBINSON, REPORTER.

¹ Judge Richmond's term of office having expired, Judge Thomson succeeded him at the April Term, 1893, and Judge Bissell became President Judge.

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REPORTS

OF THE DECISIONS

OF THE

COURT OF APPEALS

OF THE

STATE OF COLORADO.

SEPTEMBER TERM, 1892.

**ROCKWELL, AGENT ETC., PLAINTIFF IN ERROR, v. HOLCOMB
ET AL., DEFENDANTS IN ERROR.**

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33s	343
3	1
34s	141

1. AMENDMENTS.

The right to amend a complaint, even after leave is granted, is limited to an accurate and correct expression of a cause of action which theretofore had been inaccurately or insufficiently expressed.

2. PRACTICE—WAIVER OF ERROR.

Taking leave to amend a complaint after a demurrer thereto has been sustained, is a waiver of the right to assign error upon the order sustaining the demurrer.

3. PARTIES.

A person with whom or in whose name a contract has been made for the benefit of another may maintain an action thereon in his own name.

Error to the District Court of Chaffee County.

Mr. J. B. McCoy and Mr. G. K. HARTENSTEIN, for plaintiff in error.

Messrs. HAGAN & CHAMPION and Mr. C. S. LIBBY, for defendants in error.

BISSELL, J., delivered the opinion of the court.

The right to amend a complaint, even after leave granted by the court, is limited to an accurate and correct expression in legal form of a cause of action which has theretofore been inaccurately or insufficiently expressed. *Givens v. Wheeler*, 6 Colo. 149.

The sole error which is assigned is rested on the order of the court which dismissed an amended complaint filed in this suit, because it was adjudged to violate this settled rule. In October, 1890, William Rockwell brought this action against Holcomb and Cole for what he alleged to be due Otis White and James West under a written contract set out in his complaint. To avoid an undue extension of this opinion the substance of the two complaints will be stated. This will be sufficient to make the opinion intelligible, and enough for the purposes of a precedent.

In the original pleading Rockwell averred that the indebtedness was to him for the use and benefit of White and West, and amounted to \$1,537.20. The contract which was set out ran in the name of White by Rockwell, his agent, of the one part, and Holcomb and Cole of the other; it contained sundry recitals to the effect that Holcomb and Cole had leased of White a brickyard in Salida, and owed White \$1,200, according to the terms of the lease; that they were also indebted to West in the sum of \$330. After thus admitting the indebtedness, the contract substantially provided that Rockwell, as the agent of White and apparently of West, though as to that the contract was silent, should have the right to proceed to collect any moneys due, or to become due, Holcomb and Cole for brick which they might manufacture and sell. Out of the proceeds, Rockwell was to pay the expenses of the manufacture, and the provisions for the defendants and their employees, and retain any surplus to apply on the debt. Rockwell and the two defendants signed the contract. After stating the agreement, the complaint alleged the performance by Rockwell, a failure to perform by the defend-

ants, and a particular dereliction on their part in "collecting or attempting to collect" the proceeds of sales and applying the results to other purposes than as the contract specified.

The complaint set up that more brick had been sold than would be necessary to pay the running expenses, and averred that there would have been enough left to settle the debts of White and West but for this diversion. The plaintiff prayed judgment for the total amount of debt due both White and West. This was the only relief which he sought. An attachment was issued to aid in the collection of the debt. There was a traverse of the affidavit in attachment and a trial thereon. The attachment was sustained. The defendants then answered, and after trial Rockwell recovered judgment for some \$1,100. All these proceedings were had in the county court. After judgment an appeal was taken to the district court. When the cause reached that tribunal, in some inexplicable way, a demurrer seems to have been put in to this complaint, which was sustained. It is impossible to understand how the defendants acquired the right to attack the complaint in this fashion, without procuring an order permitting them to withdraw their answer and put in the demurrer. This irregularity however is of no avail as to Rockwell, the appellant, since after the demurrer was sustained he took leave to amend, and filed another complaint. *Hurd v. Smith*, 5 Colo. 233.

In his amended complaint Rockwell set up that in the spring of 1890, on behalf of Otis White, he made an agreement of lease with the defendants whereby he, as an agent, but in his own name, leased to them a certain brickyard situate near the town of Salida. The terms need not be stated further than to say that Rockwell agreed to advance \$300 to facilitate and promote the enterprise, which was to be repaid by the defendants out of the first two kilns of brick burned; the lessees were also to pay a dollar a thousand for all brick made and sold, as a royalty for the use of the yard and materials. It was alleged that Rockwell had paid the \$300 and that the defendants owed \$900 royalty. The

complaint further stated that subsequently and in September, after the failure of the defendants to pay according to the lease, they entered into the agreement which was set up in the original complaint, which authorized Rockwell to collect from Cole and Holcomb's debtors the moneys due White under this lease. The plaintiff still sought to collect the sum due West, but instead of averring an indebtedness to West, as was done in the original complaint; he set out his ownership of the debt by purchase from the original creditor. The prayer was for judgment for the total amount of the indebtedness, amounting to a little upwards of \$1,500. The defendants moved to dismiss, because the causes of action stated in the two complaints were totally variant. The court so adjudged them, and the plaintiff appeals.

Had the questions raised by this record been presented in a somewhat different shape, it might have been necessary to determine just what relief, if any, Rockwell could have obtained under his original complaint, and whether he occupied the position of a trustee of an express trust, or that of a person with whom a contract was made in the name of another, whereby he stated a cause of action. If he could recover at all, he certainly could not have recovered the amount of the original indebtedness from these defendants to White and West. That he could not have recovered the indebtedness due to White is manifest, since the contract, which was the subject-matter of the suit as it then stood, shows that Rockwell was not the trustee of an express trust, and it did not run to him for the benefit of White. It is possible, although no opinion is expressed upon that proposition, that by some amendment which the facts would have permitted him to make, he might have recovered a judgment for part or all of the sum due to West, and possibly some damages resulting from a breach of the agreement, were he able to prove any. Since he could not have recovered the sum for which he sued, so far as it was represented by White's claim, there is a manifest variance between the original and amended complaint.

According to the averments of the amended complaint, there was a right of action as to White's interest which might have been maintained in Rockwell's name, since the lease out of which the cause of action arose was made in his name, although for the benefit of another. The amended pleading counted on that right. Pomeroy's Remedies & Remedial Rights, sec.175; section 5, Code of 1887.

It is likewise true that Rockwell had a right to recover the sum of money which had been originally alleged to be due to West, since he had become the owner of it by assignment and transfer. Rockwell's right to maintain this suit for the breach of the conditions and covenants contained in the lease on behalf of his principal, and the right to maintain an action in his own name for the sum which had become due to him by purchase of the debt, was substantially a different and other cause of action than the one which he attempted to maintain in his original pleading as springing from the agreement which the defendants subsequently made to permit him to collect their debts to satisfy the White and West obligations. The amended complaint sets out the subsequent agreement of September 4th, which admits the indebtedness and clothes Rockwell with the power of collection. It is followed likewise by a statement that the defendants had not observed the agreements of September 4th. But there is nothing in the complaint which would justify a recovery on the strength of the later contract. Whatever recovery the plaintiff might obtain must rest on proof of the execution of the lease, performance of its conditions on his part, a breach by the defendants and evidence as to the damages sustained. It was thus an action on a contract other and different from that counted on in the original pleading, and as to part of it must manifestly have been had upon a totally different basis, since in the original pleading he recovered as to West's interests by virtue of a trust, and in the latter by virtue of an individual ownership. It is unnecessary to determine whether these causes of action could have been properly joined. Whether, if the original

complaint had contained enough to allow an amendment which would have accurately counted on the cause of action relied on in the present amended pleading, and it had been so framed, the plaintiff might then have recovered the West debt under his allegation of present ownership, is not open to consideration. He was not entitled to continue his suit on the basis of his amended pleading.

The court did not err in sustaining the motion to dismiss the amended complaint, and the judgment must be affirmed.

Affirmed.

ROBERTS, PLAINTIFF IN ERROR, v. ROBERTS, DEFENDANT
IN ERROR.

1. JURISDICTION—CONSTRUCTIVE SERVICE.

A decree of divorce based upon constructive service is void unless the record shows a strict compliance with all the statutory requirements.

2. SAME—MAILING COPY OF SUMMONS.

The record must show a compliance with the statute respecting the mailing of a copy of the summons to the defendant to justify the entry of a judgment.

3. SAME—PRACTICE.

Parol proof that the defendant has actual knowledge of the pendency of the action will not be considered on the hearing of his motion to set aside the judgment, because of the failure to mail him a copy of the summons, as required by law.

Error to the County Court of Arapahoe County.

Mr. BENJAMIN STAUNTON, for plaintiff in error.

No appearance for defendant in error.

BISSELL, J., delivered the opinion of the court.

The county court from which this case comes on a writ of

error was without jurisdiction to enter any judgment in the action.

In 1890, Mrs. Roberts brought suit in Arapahoe county to obtain a divorce from her husband. According to the record the husband lived in Kansas City. To effect the service of summons Mrs. Roberts filed her affidavit showing the non-residence, and thereon procured an order of publication. The summons was published according to the order. When the publication was completed the plaintiff applied for a default for want of an answer and filed proof of the publication. This was furnished by an affidavit of the publisher which showed the advertisement of the attached summons for the statutory period. It did not state that a copy of the summons was deposited in the post office, directed to the defendant at his last known place of abode, nor was this proof supplied by the affidavit of any other person.

The judgment rests on the affidavit made by the publisher. Its sufficiency was questioned and the court ought not to have entered judgment on that evidence. It is difficult to apprehend how the court fell into the error. The question was disposed of in the case of *O'Rear v. Lazarus*, 8 Colo. 608, and ever since that time it has been the law in Colorado that the proof must show a compliance with the statute respecting the mailing of a copy of the summons to the defendant to justify the entry of judgment. No good purpose would be subserved by a restatement of the reasons on which the rule rests, and it is enough to state in conformity with that opinion that all the steps which the statute prescribes must not only be followed, but proven, to confer jurisdiction on the court over the absent defendant. There was an idle attempt apparently to obviate this difficulty by the introduction of parol testimony tending to show that the defendant had information of the pendency of the suit. This proof was offered on the hearing of a motion to set aside the judgment because of this jurisdictional defect. In what way it was conceived that the difficulty could be cured by that sort of proof offered at that time, it is not easy to determine. It is

certain that the evidence was useless for the purpose, and could not render valid a judgment which must rest upon proof of an exact and strict compliance with the statute. It is very evident that if the failure to take one step could be overcome by proof of knowledge of the pendency of the action on the part of the defendant, any other requirement could be as easily and well satisfied by evidence of that knowledge.

Since the court was without jurisdiction, according to the record, to enter judgment on the proof before it, the cause must be reversed and remanded.

Reversed.

GROTH ET AL., APPELLANTS, v. STAHL ET AL., APPELLEES.

1. LIENS.

The right of a material man to claim and hold a lien must be maintained by proof bringing it directly within the statute.

2. LIENS DEPENDENT UPON CONTRACT.

The right of a material man to maintain a lien against the property of another depends entirely upon a contract, express or implied, with the owner of the realty, or an agreement between the owner and a contractor under whom he can show a derivative right.

Appeal from the District Court of Arapahoe County.

Mr. F. A. WILLIAMS, for appellants.

Mr. L. B. FRANCE, for appellees.

BISSELL, J., delivered the opinion of the court.

Wherever lien statutes give to contractors and material men the right to subject realty to their claims, the disputes between these two classes give rise to endless litigation. The appellants, Groth & Company, were material men and sold

brick to one A. W. Camp, who was a subcontractor under Wheelon and Hall, who built a house on a lot standing in the name of the appellee, Frances C. Stahl. Wheelon and Hall contracted with J. S. Stahl, Frances' husband, to do the work. The agreement was in writing, and Mrs. Stahl was not a party to it, nor was she named in it. The record presents a good many other facts which need not be referred to since the case will be decided upon different grounds from those mainly discussed in the briefs of counsel. The lien act of 1883 was amended in 1889. It is insisted that under the latter act the rights of the lien are not to be measured by the sum due at the time of the filing of the lien. The principal argument is addressed to this matter and to the consideration of the effect of the repeal and the proper interpretation to be put upon the proviso attached to the repealing section. The solution of this matter is unimportant to the adjudication of the controversy. Whether the contract proven was variant from the one laid in the complaint and the evidence supporting it therefore inadmissible, can be left out of the discussion, since the rights of the parties are completely settled by the contract which was put in evidence.

Wherever material men assert the right to file a lien against the realty of another, they must maintain it by proof bringing their lien directly within the statute. The phraseology of the statutes concerning liens is widely variant in the different states. In some it is entirely dependent upon proof of a contract express or implied, between the owner of the property and the contractor who does the work and furnishes the materials, or between the owner and the contractor under whom by means of a subcontract the material man may claim. The Colorado statute is of this class. No material man can maintain a lien against the property of another, save under a contract with the owner of the realty or by virtue of an agreement between the owner and a contractor under whom he can show a derivative right. In the present case no such contract is shown. The contract was entered into between J. S. Stahl and Wheelon and Hall. The contract neither pur-

ported to be executed on behalf of the owner of the land, Mrs. Frances, nor was there any proof which tended to show that J. S. was Mrs. Frances' agent for the purposes of making the contract. The rule concerning implied contracts need not be considered. As was said by Judge Philips in a well considered case cited below, "the law never implies a promise where there is an express promise." Since the contract is an express one, entered into by the husband in his own name and not under the assumption of an agency, it leaves but a single question, whether there is any evidence in the case which tends to show that what Mr. Stahl did he did as the agent of his wife, under an authority granted by her or to be inferred from the circumstances. There is nothing in the record to sustain any such contention. The husband never assumed to act as the agent of his wife, nor did she ever give him any authority to make a contract in her name. So far as the record shows, the lot was bought by the husband and with his money, and the title put by him in his wife's name without her knowledge. He made the contract with Wheelon and Hall for the express purpose of building a home for his family, and at the time that the contract was made and the work done it is quite improbable that Mrs. Stahl knew she was the owner of the lots. Under these circumstances no agency can be implied. What the case contains to show her knowledge that her husband was going to build, that the work was being done, and that she took a lively, wifely interest in the progress of the labor, does not amount to that proof of agency which the law requires when the material man seeks to charge it with a lien for supplies which were furnished under a contract entered into with one who was the owner of the property. *Planing Mill Co. v. Brundage*, 25 Mo. App. R. 268; *Ziegler v. Galvin*, 45 Hun, 44; *Copeland v. Kehoe*, 67 Ala. 594; *Jones v. Walker*, 63 N. Y. 612; *Woodward v. McLaren*, 100 Ind. 586; *Gillman v. Disbrow*, 45 Conn. 563; *Wendt v. Martin*, 39 Ill. 139; *Lauer v. Bandow*, 43 Wis. 556; *Willard v. Magoon*, 30 Mich. 273.

The failure of Groth & Company to prove a contract be-

tween Mrs. Stahl and the contractors under whom they claim; or one entered into on her behalf by her duly constituted agent, leaves them without any right to recover. Judgment having been entered in their favor for a portion of the sum claimed, the case must be reversed and remanded.

Reversed.

CARLILE, PLAINTIFF IN ERROR, v. HURD, DEFENDANT IN ERROR.

1. STATE TREASURER, POWERS AND DUTIES OF.

The state treasurer is clothed with the right and it is his duty to investigate the legality of every warrant before payment.

2. STATUTORY CONSTRUCTION.

The statute which invests the superintendent of insurance with authority to examine and proceed against insurance companies has no extraterritorial force.

3. SUPERINTENDENT OF INSURANCE, POWERS OF.

The superintendent of insurance, having no power to act outside of the state, has no power to disburse the public money while visiting other states,—regardless of the purpose for which he went. Such expenditures do not constitute legitimate claims against the state.

4. JURISDICTION.

Constitutional questions are without the final jurisdiction of this court, and are never considered, unless essential to the settlement of the rights of the parties to the controversy.

Error to the District Court of Arapahoe County.

Mr. J. H. MAUPIN, attorney general, and Mr. H. B. BABB, for plaintiff in error.

Mr. M. B. CARPENTER, for defendant in error.

BISSELL, J., delivered the opinion of the court.

An act of the legislature approved February 13, 1883, (General Statutes, p. 549,) established an insurance depart-

ment. The state auditor was made *ex officio* superintendent of insurance, with power to appoint a deputy, whose powers and duties were defined, but with which we have no concern, except in so far as they are specified in that portion of the section which will be quoted. After providing in detail for the organization of the department, it conferred upon the superintendent certain powers in the following language :

Section 10. "The superintendent of insurance shall have power to examine and inquire into all violations of the insurance law, and may at any time examine the financial condition, affairs and management of any insurance company incorporated by or doing business in the state, and inquire into and investigate the business of insurance transacted, and may require any company, its officers, agents, employees, or attorneys, or other persons, to produce, and may examine all its assets, contracts, books and papers; may compel the attendance before him, and may examine under oath its directors, officers, agents, employees, solicitors, attorneys, or any other person, in reference to its condition, affairs, management or business, or any matter relating thereto; may administer oaths or affirmations, and shall have power to summon and compel attendance of witnesses and to require and compel the production of records, books, papers, contracts or other documents by attachment if necessary, and shall have the right to punish for contempt by fine or imprisonment, or both, any person failing or refusing to obey such summons or order of said superintendent."

The remainder of the section gives that officer power to conduct the examination in person, or by deputy, and provides for the imposition of sundry penalties upon insurance companies, or agents, who may refuse to furnish the information which the superintendent is authorized to demand, or to do what he may direct respecting those matters committed to his control. The act afterwards provides for the payment of sundry fees which are constituted an insurance fund. The act directs the superintendent every thirty days to pay all moneys which he may receive into the treasury, and

enacts that they "shall be used for the purpose of defraying the expenses of the insurance department." These expenses are to be paid solely out of the fund arising from the execution of the statute, and not otherwise, and, at the end of the year, whatever balance may remain unexpended is to be passed into the general fund and subject of course to existing legislative appropriations.

The department was organized and in operation on the 14th of January, 1891, when the deputy superintendent of insurance, Nathan S. Hurd, incurred sundry expenses. He contracted two bills. One was for the expenses necessarily incident to his attendance upon an insurance convention held at the city of St. Louis in October, the amount expended being \$125. In the same month, under the direction of the *ex officio* superintendent, Hurd visited Knoxville, Tennessee, to examine into the financial condition of the Knoxville Fire Insurance Company, which was doing business within the limits of this state. The expenses amounted to about \$195. In conformity with the provisions of the act, Hurd drew a warrant on the state treasury, had it approved by the auditor as superintendent and presented it for payment, which was refused. Hurd thereupon filed his petition in the district court of Arapahoe county, praying for a writ of mandamus to issue against the treasurer to compel him to pay these two warrants. Judgment passed in his favor, the writ was ordered to issue, and the attorney general, representing the state, brought the case here on error. Some of the questions presented would be difficult if they were of the first impression. Most of them have been so completely settled by prior adjudications of our own supreme court, and the tribunals of sister states, that little is left to be done other than to restate the law which has been already declared.

In limine the petitioner, Hurd, insists that the treasurer is charged with no other duty than to recognize and pay a warrant drawn on the state treasury by the superintendent of insurance, if it be in the form designated by the act. It is

assumed that since the fees for which the act provides are constituted a fund, known as the insurance fund, which is to be devoted under the plan of the statutes to the payment of the expenses of the department, it is removed, both as to its amount and the settlement of the uses to which it may be properly applied, from the consideration, protection or oversight which may regulate, check, or determine, the disposition of money under the control and supervision of the officer who is by law and the constitution the custodian of the state's moneys. This cannot be true. According to the very terms of the act, neither the superintendent, nor his deputy, is clothed with the disposition of a dollar of the money which may come into their possession by reason of the enforcement of the statute. It goes directly to the state treasury, and into the custody of the officer charged by law with the safe-keeping and disbursement of the state's moneys, and can only be paid out under a warrant, as is the case with all other funds belonging to the government. While it is true that the expenses of the department of insurance can only be paid out of the receipts of the office, and it was the evident intention of the legislature to provide a fund which should be ample to liquidate them, they were still treated as part of the revenues of the state, and, except in so far as they might be absorbed in the payment of legitimate expenses arising from the enforcement of the act, they passed into the general funds of the treasury, to be consumed by the various appropriation acts payable out of the general funds of the state. Under these circumstances the moneys must be taken to be the moneys of the state, properly in the custody of its financial head, and therefore as completely subject to his control as are all other moneys coming into his custody. As to these, it has been very generally held, that he not only has the right, but is charged with the duty, to pass upon the legality and rightful issue of warrants drawn against them prior to payment. This duty is put upon him from the very nature of the duties and responsibilities of his office, and it is one of the

safeguards devised by the makers of our organic law for the protection of the public funds. He is not only clothed with the right to investigate and determine this question for himself before he proceeds to pay, but the duty of investigation is cast upon him by the law which his oath of office obligates him faithfully to discharge. *In re Appropriations*, 13 Colo. 316; *Henderson v. The People ex rel. Wingate*, 17 Colo. 587; *Institute for the Education of the Mute and Blind v. Henderson*, 18 Colo. 98.

Since it was the duty of the treasurer to consider the legality of the warrant before he proceeded to pay it, it is essential to determine whether his conclusions were correctly reached. It will be remembered that the two warrants on their face purported to cover the expenditures of the deputy superintendent of insurance while he was attending a convention of insurance commissioners at St. Louis, and while he was investigating the financial condition of a foreign insurance company at Knoxville, Tennessee. The invalidity of the warrants springs, if at all, from the fact that the disbursements were not made by the officer while engaged in the discharge of his official duties in Colorado. The act which clothes the superintendent of insurance and his deputy with authority to examine and proceed against insurance companies can necessarily have no extraterritorial force. Under all the decisions these officers are without authority outside the limits of their own state. It is evident that they would be powerless to either compel the production of books and papers, or coerce the foreign insurance companies into permitting them to make an examination into their financial condition, save by the enforcement of some penalty in the nature of a limitation upon their right to do business. *Mecham on Public Officers*, §§ 508 and 873; *Cooley's Const. Lim.* (6th ed., p. 149); *Chandler v. Hanna*, 73 Ala. 390.

Since this is true, it destroys the foundation of the contention that it is to be presumed the legislature intended to confer upon these officers power to act beyond the limits of the state, because of the inconvenience or the impossibility other-

wise to execute the authority which the act evidently intends to give. It cannot be assumed that the legislature intended to bestow what it was powerless to grant. It was unable to give them jurisdiction to act outside of the state's limits, and it must follow that there can be no legitimate inference of a legislative intention that any part of their duties should be performed elsewhere than within that jurisdiction. Express authority is essential, and this must be found in the very terms of the enactment. A careful consideration of the section quoted will serve to demonstrate that no express authority was given. Doubtless the financial condition of foreign companies can be much more economically, safely and accurately ascertained where their principal offices are situate. But if the legislature intended to give the insurance department authority to proceed by a sort of roving commission all over the country to look into the status of all companies doing business within the limits of Colorado, the right must be expressly conferred, and cannot rest on presumptions and arguments *ab inconvenienti*. They are permitted to do many things to thoroughly investigate the business and financial condition and affairs of any insurance company doing business within the state; and they are clothed with ample power to enforce the production of whatever information may be essential to enable them to reach a safe and sound conclusion. It is probably to be regretted that the legislature failed to grant the authority to make these examinations at the home offices of the companies, and to provide for the payment of the expenses necessarily incident to the investigation, for although the grant could only cover and legitimate the expenses, the enforcement in case of refusal would lie in withdrawing any permit which might have been issued. The right, however, was not conferred, and these officers could not rightfully disburse any of the state's moneys in payment of expenses incurred while visiting other states, regardless of the purpose for which they went, or the usefulness of the investigation. It is thus evident that the treasurer correctly decided that these warrants were

not legitimate claims upon the public treasury, and he rightfully refused to pay them.

It was very earnestly contended and argued on behalf of the state that under no circumstances could those warrants be paid, since the legislature had failed to make any appropriation covering the expenses of the office. This contention is based upon that provision of our constitution which declares that "no money shall be paid out of the treasury except upon appropriations made by law and on warrant by the proper officer in pursuance thereof." Constitution, art. 5, § 33.

The case has been fully disposed of by the antecedent discussion, and a determination of this constitutional question is wholly unnecessary. Constitutional questions are entirely without our final jurisdiction. They are never considered or determined by this court, unless essential to the settlement of the rights of the parties to the controversy. In all such cases it is of course our duty to determine whatever questions may be presented, but, since our declarations on these subjects lack the force of final determinations, it has always seemed to us both wise and proper to decline to decide them unless the decision be unavoidable. We therefore do not determine that question in this case.

For the reasons above expressed, the judgment of the court below ordering the writ to issue must be reversed.

Reversed.

THE GERMAN NATIONAL BANK OF DENVER, APPELLANT,
v. THE NATIONAL STATE BANK OF BOULDER, APPELLEE.

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1. NAMES.

The middle name, or middle letter, is as much a part of a person's name as either his christian or surname.

2. GARNISHEE—NAME—NOTICE.

A garnishee is not affected by a notice, writ or process served upon him, except it properly runs with an accurate description against the per-

son to whom he may be indebted, unless he had actual knowledge of the identity of the debtor and the person named in the process.

Appeal from the District Court of Boulder County.

Messrs. HARTZELL & PATTERSON, for appellant.

Mr. R. H. WHITELEY, for appellee.

BISSELL, J., delivered the opinion of the court.

W. G. Motley was indebted to the National State Bank of Boulder in 1890 on a promissory note which fell due in December. In the following January the bank brought suit on the note. By a proper proceeding under the statute it sued out a writ of attachment to aid in the collection. The writ ran, however, against W. J., and not against Motley with the middle initial G., or with his first name written in full. The German National Bank of Denver was garnished under that process by a notice which ran against W. J. It answered through its cashier that it was not indebted to W. J. Motley. The Boulder bank traversed the answer, and this issue was tried before the court, which rendered a judgment against the German National Bank for the money which was on deposit in that institution to the credit of W. G. Motley at the time the process of garnishment was served. The judgment was rendered without any amendment of the process or proceedings. The court deemed an amendment entirely unnecessary, and held the variance to be totally immaterial. The appeal is from this judgment.

The stability of the law depends upon the rigor with which the courts and profession adhere to precedents which in their scope and applicability are decisive of the case in hand. Notwithstanding the universal recognition accorded to this legal aphorism, instances are not infrequent where courts have refused to be controlled by the law as it was anciently written, when it is plainly seen to be inapplicable to the conditions of modern society. It seldom happens that a case is presented

which so well illustrates the force of the maxim *cessante ratione legis cessat ipsa lex*. It was anciently written, both in historical and legal records, that a man had but one name. David, Terah, Napthali and Jacob were rulers and prophets. William and Rufus and John were ancient kings. It is historically true that surnames were almost unknown in Europe and in England until the Norman conquest. Instances of their existence are not common even in the Domes-day book, and it was not until the statute of Henry V, concerning writs and indentures, that the use of surnames may be said to have been firmly established in the law of England. Even as late as the beginning of the eighteenth century, many families in Yorkshire had no other name than the christian. Out of these facts sprang the law which is found laid down in the early authorities, that the middle letter formed no part of the name of any person. In other words, in conformity with the then existing custom, the court said that a man was known by his first name, and accuracy in that respect was all that the law required. The law and the decisions, which were the outgrowth of the existing conditions of society, can manifestly have no application to our modern commercial organizations. The wide extension and rapid increase of population, the great and unprecedented growth of commercial transactions, have compelled the use of different forms, and the adoption of different methods to distinguish individuals. The middle name, or the middle letter, is as much a part of a man's name in this part of the present century as either his christian or his surname. The result is that the more modern authorities in the eastern and commercial states have adjudged that the middle letter, or the middle name, is as essential to the accuracy of the writ as either the christian or the surname. It would seem that when the question arises as to the rights to be secured by a process of attachment served on a third person whose position was changed prior to judgment, it may very properly be held that a mistake in the middle letter is such a legal misdescription as will avoid the process in favor of the one whose condition is altered. It appeared on

the trial of the issue presented by the traverse that after the garnishment was served on the German National Bank it paid out all the money then on deposit with it on checks properly drawn by W. G. Motley. The case thus fairly presents the question whether the bank had a right to pay out the money on checks properly drawn in the name of the depositor, though it may have been served with an attachment process running against a person with the same surname but with a different middle initial. Following the cases in Maine and Massachusetts, and relying upon the principle enunciated in the other cases which are cited, it must be held that the bank is protected in these payments. It is a well known fact in the history of all banking institutions that more than 90 per cent of all the checks that are drawn on them are drawn in the initials representing the christian and middle name of the depositor. This fact is of great moment in the settlement of this question. As was well said by one of the learned courts, "it is certain that an initial, standing with a name of baptism, is no part of it in pleading; but it follows not that an omission of it is to be disregarded as an index of notice to purchasers. Persons of the same name are individuated by various additions; sometimes by title, profession, residence or seniority; sometimes by numerals; sometimes by color of complexion and hair; and sometimes by an initial." Pursuing this same line of reasoning, it was held that the initial is a part of the name, and that Sarah Sisson and Sarah F. Sisson are different names. This rule would make the name W. G. a different and another name than W. J. The result must be that the German National Bank was not bound by the writ which sought to hold any funds in its possession belonging to W. J. Motley, so long as it was not shown that the bank held any money belonging to any W. J. Motley. *Dutton v. Simmons*, 65 Me. 583; *Terry v. Sisson*, 125 Mass. 560; *Bowen v. Mulford*, 10 N. J. L. 230; *Esther Hutchinson's Appeal*, 92 Pa. State, 186; *Wood v. Reynolds*, 7 W. & S. 406; *Fewlase v. Abbott*, 28 Mich. 270; *Tweedy v. Jarvis*, 27 Conn. 42; *Perkins v. McDowell*, 23 Pac. Rep. 71; Waples on Attachment, p. 350.

It is not intended to so broadly declare this doctrine as to necessarily make it applicable to grants and contracts where the identity of the persons may be the subject-matter of easy proof, nor to cases of pleading which are susceptible of amendment without detriment to the rights and interests of third parties, but simply and solely to those writs and notices by which it is sought to hold third persons whose rights may be affected by the error, and whose situation has changed before they may have in any known legal way become charged with knowledge and notice of the identity of the individual described by the erroneous name. There was no showing in the present case that the bank had any knowledge whatever that their depositor was the one sought to be reached by the process at the time they paid out the money on his checks. Confining the decision to this particular class of cases, it is held that a garnishee is totally unaffected by any notice which may be served upon him, unless it properly runs with an accurate description against the individual to whom he may be indebted, unless it be in those cases where the proof may show that the garnishee had actual knowledge of the identity of the debtor and the person named in the process. Whether, if the evidence demonstrates that the holder of the fund is not misled by the error in the writ, and from the facts must know that he is indebted to the defendant in the suit, he may disregard the process and rely on a technical inaccuracy for his defence, is a question not clearly presented by the record, and it is therefore left undetermined.

Since the court below rendered judgment in contravention of this principle and held the bank bound, though its creditor was erroneously described, its action must be reversed and the cause remanded for a new trial in conformity with this opinion.

Reversed.

HALLOWELL ET AL., APPELLANTS, v. LEAFGREEN, AP-
PELLEE.

GARNISHMENT.

A garnishee is not chargeable unless the defendant could recover in his own name and for his own use that which the plaintiff seeks to secure by garnishment.

Appeal from the County Court of Arapahoe County.

APPELLEE was a contractor for brickwork in the construction of buildings; D. R. McCurdy and one Geiger, doing business under the name of McCurdy & Company, made a contract with appellee to do the brickwork on two residences by them being built for \$1,375; the work was performed and some extra work done, making the aggregate \$1,660, which included \$80.00 in money lent to D. R. McCurdy individually, of which, it was claimed, \$212 was left unpaid at the completion of the work and remains so. Appellants had a contract with McCurdy & Co. whereby they were to furnish the money to build the houses, paying upon the estimates as the buildings progressed, and the balance of the contracted amount at their completion. By an agreement between all parties, appellee waived, in writing, the right to a builder's lien upon the property, and delivered the waiver to appellants. Before the matter was settled and adjusted, appellee entered into a contract to do the brickwork on three other residences at a different place. It was claimed by appellee that the last contract was made by D. R. McCurdy and not by McCurdy and Geiger, who made the former contract. It was claimed by appellants that the contracting parties for the last three buildings were Clementina McCurdy and one Frank Mayo; that D. R. McCurdy and Geiger had no interest whatever in the transaction, and that D. R. McCurdy only participated, as agent for Clementina. At the completion of the work on the last three buildings, the balance against McCurdy & Co.

on the first two remained unpaid. Appellee brought suit against them (McCurdy & Co.), sued out an attachment and had garnishee process served upon appellants. Appellants (garnishees) answered that on Oct. 9, 1891, there was a balance in their hands of \$275.81 due *Mayo and Clementina McCurdy*, which, after that date was accounted for in payment of different items to complete the buildings, which it was alleged should have been done by the contractors; that there was nothing due David R. McCurdy and had not been since the commencement of the suit. The answer was traversed, a trial had to a jury, resulting in a verdict and judgment against garnishees (appellants) for \$212 and costs.

Messrs. BENEDICT & PHELPS, for appellants.

Mr. GEO. F. DUNKLEE and Mr. O. E. JACKSON, for appellee.

REED, J., after stating the facts, delivered the opinion of the court.

There may have been some juggling between the parties in regard to the two contracts, but the facts are conclusively established by the evidence that the transactions with appellants were separate and distinct contracts; the first with Geiger and McCurdy (D. R. McCurdy & Co.); the second with Mayo and C. McCurdy. It is not claimed that Geiger of McCurdy & Co. had any connection with the second contract. Whatever money was due appellee upon building contract was upon the first contract, and was due by McCurdy & Co., while a part of the claim for which judgment was given was for borrowed money due by D. R. McCurdy individually. The money sought to be reached in the hands of garnishees was admitted to be money due upon the second contract. It is contended that D. R. McCurdy was the real party in interest, but the position is not sustained by the evidence. The lots upon which the three last houses were

built were in Mayo and McCurdy, and they conveyed to a purchaser. Although D. R. McCurdy may have participated in the last contract as agent or otherwise, appellee was not misled as to the real contracting parties. He admits that vouchers or orders to draw money from appellants on the first contract were executed by D. R. McCurdy & Co., while upon his first estimate on the last building, and subsequently, they were drawn by Mayo and C. McCurdy. The contracts of appellants by which they were to furnish money were shown to have been separate and distinct, and made with entirely different parties.

The answer of appellants was fully sustained by the evidence, nor was there any evidence that could change their legal status and allow them to pay money arising out of, and due upon, the second contract, upon the first. Judgments, in order to be valid, must be based upon legal principles and warranted by evidence. Judgments resting entirely upon whim, caprice, suspicion and inference of court or jury cannot be sustained. There may have been fraud and collusion between D. R. McCurdy, Clementina McCurdy and Mayo, but to affect the legal liability of appellants, it must have been shown, and the money shown to have belonged to D. R. McCurdy; otherwise, garnishees would have no protection against a liability to pay twice.

Several errors are assigned upon the ruling of the court in admitting and rejecting evidence which we do not think it necessary to consider. Under the evidence there were no questions to be determined by the jury, and the court should have instructed it that under the proof plaintiff could not recover. It follows that the instructions given were faulty and that the court erred in refusing to give the following instructions asked by appellants:

“In order to find for the plaintiff and against the garnishee in this case, you must find that there is such a liability on the part of Hollowell & Co. to D. R. McCurdy as would enable him to maintain his suit or action directly against Hollowell & Co., in his own name and for his own use, and recover a

judgment against Hallowell & Co.; and if there is no such liability on the part of Hollowell & Co., then your verdict must be for the garnishee."

It is a well-settled rule of law that the garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment. Waples on Attach. 202; Drake on Attach. § 458.

It is the rule in the federal courts, and has been so held in most of the state courts, and is the well-settled rule in this state. *Sickman v. Abernathy*, 14 Colo. 174; *U. P. Ry. Co. v. Gibson*, 15 Colo. 300; *Marks v. Anderson*, 1 Colo. Ct. App. 4; *Denver, T. & F. W. Ry. Co. v. Smeeton*, 2 Colo. Ct. App. 126.

It is clear from the evidence put in by both parties that neither D. R. McCurdy & Co. nor D. R. McCurdy had any claim against appellants that could have been collected by a proceeding at law. Appellee could not occupy a better position than the defendant.

The judgment must be reversed and cause remanded.

Reversed.

BARKER, APPELLANT, v. NICHOLS, APPELLEE.

FRAUD—PROOF.

An action for damages, as for deceit, is maintainable upon an executed contract. In order to prove such fraud as will sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff.

Appeal from the County Court of Arapahoe County.

Mr. JOHN T. BOTTOM, for appellant.

Messrs. HIPP & TESCH, for appellee.

REED, J., delivered the opinion of the court.

Appellee, in erecting a two-story, brick, business building in the city, employed appellant to put in the foundation according to the plans and specifications furnished by the architect for a gross sum of \$600. When the work was completed, and bricklayers and carpenters were ready to put on the superstructure, they declined to do it unless at the risk of appellee, alleging that the foundation was not adequate to sustain the structure, particularly the front, the upper story of which was to be sustained by iron pillars, the feet of which were to rest upon stone piers which were put in by appellant. After examination, it is alleged that the piers were found faulty, and not complying with the contract; appellee had two taken out and rebuilt by other parties after appellant had refused to do it, at an expense of \$24.00; the balance was used, but it was claimed that appellee was damaged in quite a large sum by failure of the appellant to build the balance of the wall according to contract, as the building settled and cracked by reason of such failure. There was also a claim of damages for loss of rent for the time the structure was delayed by reason of the improper work. The case was tried to the court without a jury; the work had been fully paid for before its defects were known; the suit was brought for damages; the court found for appellee, and assessed her damage at \$100. That appellee had two piers removed and new ones built costing \$24.00 is conceded. In regard to the character of the work, the evidence was contradictory, but as to the piers it is conclusive that they were not as required to be—two feet square, of proper material, and laid with proper mortar.

It is contended in argument that the appellee had no cause of action; that having negligently paid the money without examination of the work, she could not recover it. The objection does not appear to have been made in the lower court. We do not consider the position tenable. The action was not to recover back money paid, but for damages for breach

of contract. At common law it would be regarded as an action on the case, as for *deceit*, which was always maintainable upon an executed contract. Admitting the position of counsel, it is not sustained by the authorities cited. The doctrine only applies where the defects are patent and apparent; concealed defects took the case out of the rule. The foundation of the action is fraud and deceit in the defendant and damages to the plaintiff.

3 Term Rep. 57 :—"In order to prove such fraud as will sustain this action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff." *Polhill v. Walter*, 2 Barn. & Adol. 122; *Corbet v. Browne*, 8 Bing. 433; *Langridge v. Levy*, 2 M. & W. 519.

"The principle of law is that fraud accompanied by damage is in all cases a good cause of action." Kerr on Fraud & Mis. 325, and cases cited in notes.

Counsel appear to have been mistaken in the facts. They say :—"The appellee herself says, that she went and measured the wall and called Mr. Barker's attention to it, and there was a question then and there . . . as to whether the contract was complied with, and after this dispute about the most vital and almost only question in the case of moment, the appellee pays the appellant in full." The testimony shows that on the completion of the work the father of appellee, in her absence, paid the balance of \$130 at the urgent request of appellant; that the appellee had no knowledge of the defects, until afterwards when the contractors informed her, and declined to put on the superstructure until the defects were remedied; she then examined the work and had the interview with appellant, not, as supposed, before the payment of the money.

The question of law discussed above is the only one presented or involved, and does not appear to have been raised in the lower court, consequently, all the questions determined were questions of fact. The evidence of damage took a wide range between \$24.00, the price of the piers, and \$800.

The court was warranted in finding \$100 damage; also, in finding that the work was fraudulently done, and not as contracted or contemplated.

Where there is sufficient evidence to warrant the finding of facts, the judgment will not be disturbed; it will consequently be affirmed.

Affirmed.

3	28
8	443

HANNA, PLAINTIFF IN ERROR, v. THE COLORADO SAVINGS BANK ET AL., DEFENDANTS IN ERROR.

1. MECHANICS' LIEN.

The right of mechanics and others to a lien and the remedy for enforcing it are purely statutory, and the sufficiency of a complaint to foreclose it can be tested only by statutory provisions.

2. STATUTORY CONSTRUCTION—PLEADING.

While the statute giving liens to mechanics and others should be liberally construed in favor of those entitled to invoke it, such facts should be stated in the complaint as show a full compliance with its provisions and that the plaintiff has a claim that he has a legal right to enforce.

3. LIENS—RIGHTS OF ASSIGNEE.

A lien is given to those who shall do work or furnish material by contract, express or implied, with the owner. But the assignee of a laborer's claim can recover only by alleging and proving a specific sum due his assignor by reason of labor performed under a contract, and that by virtue of the assignment he succeeded to it.

4. NOTICE OF LIEN.

A statement filed by one claiming to be the assignee of numerous demands which sets forth the aggregate amount of indebtedness, but does not show the balance due with respect to each separate claim, is defective and insufficient.

Error to the District Court of Arapahoe County.

ON the 9th of March, 1889, John J. Reithman leased to one William L. Smith, lots 17, 18, 19 and 20 in block 231 in the city of Denver for a term of five years. Smith associated with himself as a partner one C. M. F. Bush, Jr., and erected a building upon the property known as The Metropolitan

Theater Building. In order to erect the building, Smith and Bush borrowed large sums of money from The Colorado Savings Bank (a defendant in error), for which they made their promissory notes for various amounts maturing at different dates, drawing interest at 7 per cent, such notes aggregating \$10,600; to secure which they executed a trust deed upon the leasehold interest and the building to T. B. Stuart as trustee; also a chattel mortgage upon the personal property contained in the theater building. The mortgagors in the trust deed covenanted to pay all taxes when due and to keep the property insured for benefit of mortgagees in an adequate amount. On the 28th of March, 1890, The Colorado Savings Bank commenced proceedings to foreclose, alleging default in every particular to date, asking the appointment of a receiver, and that the property be sold in satisfaction, etc. Other parties claiming liens or interests were made codefendants. This brief statement is deemed sufficient for an understanding of the subsequent proceedings. On the 2d day of November, 1889, Mary E. C. Van Ham, claiming as assignee of a large number of claims for labor done upon the premises, caused the following paper to be filed for record in the office of the county clerk:

“To John J. Reithman, William Lockhart Smith, The Metropolitan Theater Company, and to all whom it may concern:—

“Know ye, that Mary E. C. Van Ham, wishing to avail herself of the provisions of an act approved April 18th, 1889, entitled,

“An Act to amend an act, entitled An Act to secure liens to mechanics and others, and to repeal all other acts in relation thereto, approved March 2d, 1883; hereby does make the following statement of lien and claim therefor, and property to be affected thereby:

“First.—That the name or names of the owner or owners of such property to be charged with the lien are: John J. Reithman, William Lockhart Smith, The Metropolitan Thea-

ter Company, and if there are others they are unknown to the claimant.

“Second.—That the name of the person claiming the lien is Mary E. C. Van Ham. That the names of the persons who performed the labor for which the lien is claimed are:”

Here follows a list of 127 names, several being the surnames only, the christian names being left blank.

“That each and every one of aforesaid persons who performed the labor for which said lien is claimed for valuable consideration to them and each of them in hand paid by Mary E. C. Van Ham, and the further consideration of said claimant agreeing to enforce, and for the purpose of the enforcement of such lien, did each severally assign, in writing, his claim and lien, together with all the rights and remedies of assignors, unto Mary E. C. Van Ham, the above claimant.

“That the last item of work done, or labor performed by the persons who performed the labor for which the said lien is claimed was done and performed on the 23rd day of September, A. D. 1889, by each of them. That the name of the first contractor is ———.

“Third.—That the property to be charged with such lien is described as follows:—

“All the lots numbered seventeen (17), eighteen (18), nineteen (19), and twenty (20) in block numbered two hundred and thirty-one (231), East division of the city of Denver, in the county of Arapahoe, and state of Colorado, together with all the buildings and improvements thereon.

“Fourth.—That the total amount of indebtedness on which said lien is claimed for the labor performed, is forty-two hundred and forty-one dollars and sixty-eight cents; that there are no credits thereon, and that the balance due the claimant is forty-two hundred and forty-two dollars and sixty-eight cents.

WILLIAM YOUNG,

“Agent for Mary E. C. Van Ham, Claimant.”

Verification.

On the 27th day of March, 1890, Van Ham commenced a

suit to enforce a mechanics' lien. On the 9th day of October, 1890, while such suit was pending and undetermined, Van Ham assigned to J. R. Hanna, plaintiff in error, who on the 20th day of November, 1890, filed an amended complaint of great length, embodying in full the document or statement of Van Ham above set out. Such amended complaint no further defined or described the original claims of which the aggregate amount of Van Ham was made up, and showed no further compliance with the statute upon the part of Van Ham or anyone else. The only change or modification of the original allegations was that the amount of \$4,241.68 stated by Van Ham in complaint was not correct, that the proper amount was \$3,187.50. To this complaint a joint demurrer of The Metropolitan Theater Company, Thomas B. Stuart, Frank K. Atkins and J. J. Joslin was filed. There was also a demurrer filed by A. H. Andrews & Co., and A. C. Fischer. Several grounds of demurrer were set out in each, yet they are very nearly identical in legal effect. All may be said to be, that the complaint does not state a cause of action under the statute. The demurrers were sustained and the supposed lien held void as against the mortgage liens.

Mr. E. KEELER and Mr. WILLIAM YOUNG, for plaintiff in error.

Mr. J. H. DENNISON, Mr. R. B. STEVENS, Mr. T. B. STUART and Messrs. BENEDICT & PHELPS, for defendants in error.

REED, J., after stating the facts, delivered the opinion of the court.

Only one question is to be determined, viz., the sufficiency of the complaint. Mary E. C. Van Ham brought suit to enforce a lien aggregating \$4,241.68 for labor performed by 127 different persons, alleging that each individual claim had been by the claimant assigned to her. A list of the names is incorporated, several of them being a surname only, the

christian name being omitted. There are no accounts stated or data by which the amount of each individual claim can be ascertained, or showing how the aggregate amount was made up. The right of plaintiff in error is based upon an alleged assignment to him of the claim of Van Ham, while her suit was pending and undetermined. After the assignment to plaintiff, he filed an amended complaint in which the original complaint of Van Ham is embodied in full and made a part. There is no amendment made to the original causes of action, as stated in the Van Ham complaint, except that in that the aggregate amount due Van Ham is stated to be \$4,241.68, and in the amended complaint of plaintiff, after setting out the assignment of the cause of action to him, he states that the aggregate amount due is not \$4,241.68, but is \$3,187.50, for which he asks a lien. In this, as in the Van Ham complaint, no items are given to make the aggregate, and although no payments had been made the aggregate is reduced over \$1,100, without showing how the reduction was affected. Although in the Van Ham complaint it is alleged that the individual claims were assigned in writing as required by statute, no form of the assignments is given by which the regularity could be determined, and if written assignments were made in each instance, it is rather surprising that even the name of the assignor was not known. The right to a lien and the remedy for enforcing it are purely statutory, and the sufficiency of the complaint can only be tested by its provisions and requirements.

It is hardly necessary to say that while a statute of the character in question should be liberally construed in favor of those who have the right to invoke its aid, the remedy granted being special and entirely dependent upon the statute, its requirements must be complied with, and such facts stated in the complaint as show full compliance, and show that the party has a claim that he has a legal right to enforce. *Decker v. Myles*, 4 Colo. 566; *San Juan etc. Co. v. Finch*, 6 Colo. 214; *Greeley Co. v. Harris*, 12 Colo. 226; *Cannon et al. v. Williams*, 14 Colo. 21.

The provisions of the statute are as follows :

“Whoever shall do any work or furnish any material by contract, express or implied, with the owner of any land, his agent or trustee, for the construction, enlargement, alteration, or repair of any building or other structure upon such land, or in making any other improvements or in doing any other work upon such land, as stated in the following sections, shall have a lien upon such land, building, structure or other improvement for the amount and value of the work so done or material so furnished. * * * For the purpose of this act the term ‘work’ shall be deemed to include labor of every kind, whether skilled or unskilled; and for said purposes, except when otherwise indicated, any person having an assignable, transferable or conveyable interest or claim in or to any land, building, structure or other property mentioned in this act, shall be deemed an owner. Any person rendering personal services for wages or otherwise, or by the use of machinery, teams or otherwise, shall be deemed a contractor or sub-contractor of either degree as the case may be, as well as any person doing work by the job or piece.” 2 Mills Ann. Stat., pp. 1609-10, § 2867.

“Any person wishing to avail himself of the provisions of this act shall file for record, in the office of the county recorder of the county wherein the property to be effected (affected) by the lien is situated, a statement containing:

“First.—The name or names of the owner or owners of such property, or in case the owner or owners be not known to him, a statement to that effect.

“Second.—The name of the person claiming the lien, the name of the person who furnished the material or performed the labor for which the lien is claimed, and the name of the contractor, when the lien is claimed by a sub-contractor or by the assignee of a sub-contractor, or in case the name of the contractor is not known to him, a statement to that effect.

“Third.—A description of the property to be charged with the lien sufficient to identify the same.

“Fourth.—A statement showing the total amount of the

indebtedness, the credits thereon, if any, and the balance due such claimant. Such statement shall be signed and sworn to by the party claiming such lien, or by some person by him authorized, to the best knowledge and belief of the affiant. In case two or more persons claim an interest in the same lien, it shall be sufficient for one of such persons, or some other person in their behalf, to verify such statement, and the signature of any such affiant to any such verification shall be a sufficient signing of the statement. In order to preserve a lien for work performed or material furnished by a subcontractor there must be served upon the owner of the property, his agent or trustee, at or before the time of filing with the county clerk and recorder the statement above provided for, a copy of such statement. If neither the owner nor any agent of the owner can be found in the county where the property is situated, an affidavit to that effect shall be filed with the aforesaid statement." 2 Mills Ann. Stat., pp. 1617-18, § 2876.

By sec. 2888 it is provided: "Any number of persons claiming liens and not contesting the claim of each other may join as plaintiffs in the same action, and when separate actions are commenced the court may consolidate them upon motion of any party or parties in interest or upon its own motion."

Before any attempted assignment there must have been 127 individual claims, capable of being made causes of action, varying in amounts, which, by an assignment in writing, could be aggregated, and after trial have been made an aggregated judgment. Yet upon trial each of the 127 individual causes of action would have to be established. In the language of the statute each is a "claimant" and each must comply with the law, and the defendant has a legal right to contest each separate and individual claim, although in the hands of the assignee. An aggregated judgment may be entered as the result of the findings of the individual claims. Each of the 127 claims must be regarded and tried as a separate suit; hence, defendants by the complaint should have been inform-

ed of the claim of each, and the balance due, so as to enable them to answer and contest each individually.

Assignees taking by virtue of an assignment could take no greater rights than their assignors had, viz., a right to assert and enforce the lien. When an assignee declares himself entitled to an amount as an aggregate sum resulting from 127 assigned, without giving any amounts making the aggregate or due any individual, the defendant could only answer and contest the aggregate as claimed by the assignee instead of the claims of the claimants who had a right to invoke the statute. This view is fully sustained by the statute, and must, of necessity, be adopted; otherwise, defendants would be absolutely precluded from defending against the original claimant, asserting his right to a statutory lien for labor alleged to have been performed.

By the language of the statute, the lien is given to those "who shall do any work or furnish any material, *by contract, express or implied*, with the owner," etc. There is no privity between the assignee and the owner, and the assignee could only recover by alleging and proving a specific sum due his assignor by reason of labor performed under a contract, and that by virtue of the assignment he succeeded to it.

This view is sustained by *Cannon v. Williams*, 14 Colo. 21, where it is said, "The doctrine of liberal construction is not broad enough to cover such defects as the one in question. There is not a substantial compliance with the statute. Stating a balance due can hardly be regarded even as an attempt to give the abstract of indebtedness required."

In *Keystone Co. v. Gallagher*, 5 Colo. 23, it is said:—"The demands of the lien claimants are several in their nature and in the mode of their enforcement. Each files his separate statement as the statute requires; each presents his separate petition to enforce the lien, and therein sets out his particular cause of action. * * * Each claim so presented is, in its nature, a several and distinct action, but in order to avoid a multiplicity of writs, sales and costs, and to prevent preferences among lien claimants, * * * all the claims may

be heard and determined in, nominally, one proceeding adjudicated at one time, and enforced under one decree." See, also, *Power v. McCord*, 36 Ill. 214.

We conclude that the judgment of the court sustaining the demurrers was correct. No cause of action whatever was shown. The aggregate amount in the hands of the assignee was not within the statute; no other was attempted to be pleaded.

Affirmed.

JANUARY TERM, 1893.

MARTIN, PLAINTIFF IN ERROR, v. MCCARTHY, DEFENDANT
IN ERROR.

3	87
358	435

1. INTERVENTION.

Any person who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both, may, intervene in the action.

2. SAME—EFFECT OF DISMISSAL.

A voluntary dismissal of an intervention, without any agreement of the parties or other circumstances tending to show that such dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action by the intervenor.

3. NONSUIT.

A voluntary nonsuit taken by the plaintiff at any time before trial does not estop him to bring a new action.

Error to the District Court of Pueblo County.

Messrs. DIXON & DIXON and Messrs. URMY & CRANE,
for plaintiff in error.

Messrs. ROGERS, CUTHBERT & ELLIS, for defendant in
error.

RICHMOND, P. J., delivered the opinion of the court.

November 26, 1890, Frank C. Taft made an assignment for the benefit of his creditors to Edmund H. Martin, plaintiff in error. Prior to the assignment, the sheriff of Pueblo county, T. G. McCarthy, pursuant to a writ of attachment sued out, seized a stock of merchandise and had the same in custody at the time of the assignment. The assignee demanded possession of the stock, which was refused. Thereafter Beifeld & Co. instituted an attachment proceeding in the district court of Arapahoe county against Taft and the

sheriff of Pueblo county and levied upon the property covered by the assignment and former attachment writ. Subsequently Martin filed a plea of intervention which Beifeld & Co. answered. Before the trial of the plea of intervention either on the pleadings or the merits and after the order of sale had been entered, Martin voluntarily dismissed his intervention proceeding with the consent of the court and subsequently commenced an action for damages against the sheriff. Trial was had in the county court and judgment rendered in favor of Martin for the sum of \$1,542.23. An appeal was taken to the district court where, after the evidence offered by plaintiff had been received, defendant moved the court to dismiss the action on the ground that Martin had two remedies, and having elected to claim the property as intervenor in the original attachment suit, he thereby defeated his right to institute an action for the value of the goods. The motion to dismiss was sustained. The only question involved in this appeal is, did the action of Martin in instituting the intervention proceedings and subsequently dismissing, defeat his right to institute another action.

The code provides that any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both * * *.

We do not think that this or any other provision of the code makes it obligatory upon a party to intervene in proceedings where the title to property or the possession thereof is involved, although he may know of the proceedings, be the owner or entitled to the possession. It is clearly a right that he may exercise, and one he could not have exercised unless conferred by statute.

By the code it is also provided that an action may be dismissed or a judgment of nonsuit entered in the following cases :

First. By the plaintiff himself at any time before trial upon the payment of costs if a counterclaim has not been made * * *. Session Laws, 1887, p. 149.

By the record in this case we learn that this action of dismissal was voluntarily made by the attorneys for the intervenor. It was not the result of an agreement between the parties nor did it amount to a *retraxit*. It was nothing more than a discontinuance, and after a most thorough examination of all the authorities at our command, we have reached the conclusion that the dismissal under the circumstances did not defeat his right to institute another action.

In *Freas et al. v. Engelbrecht et al.*, 3 Colo. 377, this language is used: * * * "It was never heard that judgment of *non pros.* at law, or the dismissal of a bill in equity, expressly for default of prosecution, would bar another suit at law, or a new bill in equity for the same cause. The judgment or decree it is said is but 'the blowing out of a candle which a man may light again at his pleasure.'"

In the case of *Parks v. Dunlap*, 86 Cal. 189, Works, J., in commenting upon a similar proposition says: "The contention of the appellant is, that the dismissal as to him, in the former action, was a *retraxit*, amounted to an adjudication in his favor, as to the validity of his mortgage, and is a bar against the respondents to any defense against it. Conceding, however, that the question in litigation in the former action was the same now presented, it is well settled that the voluntary dismissal of an action, without any agreement of the parties or other circumstances tending to show that such a dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action." *Merritt v. Campbell*, 47 Cal. 542; *Crossman v. Davis*, 79 Cal. 603.

In the case of *The First National Bank of Ft. Dodge v. Haire et al.*, 86 Iowa, 443, it was held that "where a plaintiff by his counsel enters a dismissal of his cause in writing on the back of the petition, with the manifest intent of dismissing it, and both parties act accordingly, the action will be deemed dismissed, and its pendency cannot be relied upon to defeat a subsequent action for the same cause.

Where a suit is discontinued after judgment the adjudica-

tion concludes no one and is not an estoppel or bar in any sense. *Loeb v. Willis*, 100 N. Y. 231.

In *National Water Works Company v. The School District*, 23 Mo. Court of Appeals, 227, it was held that a "nonsuit is, in effect, a dismissal of the action, and this may be done at any time before the final submission for the verdict of the jury. A voluntary nonsuit, taken by the plaintiff at any time before the judgment, will not estop him to bring a new action. Much more so should this rule apply where the nonsuit is enforced by an adverse conclusive ruling of the court."

The plaintiff by entering a nonsuit retains the advantage of bringing another action, and this he can doubtless do when the nonsuit is ordered by the court. *Mason v. Lewis*, 1 Gr. Greene's Reports, 496. See, also, *Smith v. Ferris*, 1 Daly, 18; *Lambert v. Sandford*, 2 Blackford, 137; 18 Amer. Dec. 149.

A decree dismissing a bill is no bar to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is *res adjudicata*. *Chase's Case*, 1 Bland's Ch. 206; 17 Amer. Dec. 277.

* * * It is conceded that a previous suit against one or more is no bar to a new suit against others even though the first suit be pending, or have proceeded to judgment when the second is brought. The second or even a subsequent suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction, or to have elected to rely upon one proceeding for his remedy to the abandonment of the others * * *. Cooley on Torts, p. 157.

We could multiply authorities in support of our position, but we deem it unnecessary to do so. There was no judgment upon the merits in the controversy between the attaching creditor and intervenor. No agreement entered into nor personal appearance on the part of the intervenor which would amount to a *retraxit*.

The contention of defendant in error that the parties, having elected to file a petition in intervention, whereby they

claimed the possession of the property in controversy as against all the parties, are estopped from bringing this action, we cannot sanction. All of the cases cited in support of their contention do not present the question as in the case at bar. There is no doubt that there are certain acts or omissions of a party by which another is injured, from which a liability results to make compensation in damages. In such cases the law implies a promise to pay the damages and the injured party may treat the action as arising from the tort, or, by waiving the tort, sue upon an implied contract by setting forth the facts from which the law infers a promise. This right exists for the wrongful taking or conversion of chattels, things in action or money; the wrongful use of lands; appropriation of rents and profits; fraud of purchaser in obtaining goods on credit. Thus, when goods and chattels have been wrongfully taken or detained, and have been sold or disposed of by the wrongdoer, the owner may sue in tort for the damages or he may waive the tort and bring his action on the implied promise. Maxwell on Code Pleading, p. 581.

By the intervention proceedings Martin did not waive the tort, nor was it a complaint based upon an implied promise. In neither of the proceedings—the one now under consideration or the intervention—was or is there a waiver of the wrongful taking.

The single principle, upon which the entire doctrine of election rests, is very simple and is formulated by Mr. Pomeroy as follows:—"From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults; or may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law." Pomeroy on Remedial Rights, § 568.

The New York cases cited are in keeping with this principle and in no sense militate against our conclusion. We think the court erred in sustaining the motion to dismiss the action.

The judgment must be reversed and the cause remanded for further proceedings.

Reversed.

On rehearing the following opinion was announced:

PER CURIAM. We have carefully examined the authorities submitted on the rehearing in this case.

At the time of writing the opinion our attention had not been called to cases wherein the exact propositions now under consideration had been discussed.

In the case of *Perrin v. Claflin*, 11 Mo. 13, it is held that "Where the goods of one are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass."

The general doctrine is that "One who is the owner of property attached to that of another, may either intervene in the suit to claim his property, or he may sue the sheriff or the purchaser without making himself a party to the attachment suit. When he has been adjudged the owner, he has his action against the sheriff for wrongful seizure" * * *. *Waples on Attachment and Garnishment*, p. 483.

The Supreme Court of Missouri in the case of *Clark v. Brett*, 71 Mo. 473, a case similar to the one now under consideration, say: "It is contended with plausibility, by defendant's counsel, that Clark, on the seizure of the goods by the sheriff, had his election to sue in trespass or replevin, or to interplead under the statute; and that having elected to proceed under the statute, and obtained a judgment in his favor, he is precluded from resorting to any other remedy. The judgment rendered was for the recovery of the property

which had been sold under the order of the court, and the proceeds of sale were considerably less than the invoice price of the goods." Held that "The recovery of judgment by an interpleader in attachment proceedings, will be no bar to an action by the interpleader against the attaching officer for the wrongful seizure."

These authorities and others furnished by the plaintiff in error conclusively satisfy us that we should adhere to our opinion.

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MITCHELL ET AL., APPELLANTS, v. HUGHES, APPELLEE.

1. MARRIED WOMAN—TESTAMENTARY POWER.

At common law a *feme covert* was incapable of disposing of a freehold estate by will.

2. SAME.

Under the statutes of this state a married woman is, as against her husband, under disability to dispose of more than one half of her estate by will.

3. EQUITY JURISDICTION—PROBATE MATTERS.

A court of equity will not entertain jurisdiction to set aside the probate of a will unless some special and exceptional circumstances be averred which warrant the interference.

4. JURISDICTION OF COUNTY COURTS.

Original jurisdiction to admit a will to probate and to proceed to such final determination as shall settle the rights of all parties concerned is vested in the county courts.

Appeal from the District Court of Weld County.

Mr. B. L. CARR and Mr. F. P. SECOR, for appellants.

Mr. GEORGE S. ADAMS, for appellee.

BISSELL, J., delivered the opinion of the court.

By a bill which was good in form if it had been sufficient in substance, William Hughes, the appellee, sought to set

aside what purported to be the last will and testament of one Jane Hughes, known at the time of her death as Jane Mesclon. In its substantial averments the complaint set forth a marriage on the 20th day of April, 1870, between Hughes and the decedent, who was then Jane Stevens, and alleged the continued existence of the marriage relation to the time of her death on the 13th day of August, 1887. The will bore date the 9th of April, 1886, and bequeathed all of the estate of the decedent, both real and personal, to Rachel Hillier, her daughter. After the death of the deviser, and on the 11th of October, 1887, the will was presented for probate to the county court of Weld county, and was duly probated. There is no question concerning the regularity of the proceedings in that tribunal, the qualification of the executors, and their entry upon the discharge of their duties. Mitchell and Probert were appointed guardians of the minor devisee, Rachel E. Hillier. They took possession of all the decedent's property. When this suit was started they were managing the estate, collecting its rents, issues and profits, and disposing of it according to the terms of the will. Hughes prayed that the will be set aside and he be decreed the sole heir, and entitled to the immediate possession of all the property, for an accounting and general relief.

The defendants by their answer denied all the material averments of the complaint and then set up an affirmative defense which substantially stated that Hughes and the decedent Jane lived together and cohabited as man and wife for about a year in the state of Pennsylvania, when Hughes deserted her and came to Colorado to live. Jane followed him to the state within a year, when they resumed their apparent relations of husband and wife, and continued to live in that fashion for about six months. In 1872, Hughes again deserted her and removed to Illinois, where he remained until after her death in 1887. This plea likewise set up a marriage and cohabitation between Hughes and another woman, with whom he lived until he brought this suit. It was averred that the desertion in 1872 was absolute and final; that the

wife had never heard of or from Hughes from that time to the day of her death ; that he failed to contribute to her support ; and generally stated that he continued in good health and possessed of his full earning capacity. During all those years of separation the decedent carried on business as a *feme sole*, and accumulated all the property which she attempted to dispose of by her last will and testament.

The plaintiff moved to strike out the affirmative defense and it was eliminated from the pleading. The defendants moved to dismiss the action. This motion was argued and denied. Leave was then given to the plaintiff to amend, and he inserted an allegation that he was never served with process, and did not appear at the probate of the will in the county court. Thereafter the defendants withdrew their general denial and demurred to the amended complaint. The demurrer was overruled, and a decree was entered declaring the will to be null and void, and setting aside the proceedings for its probate in the county court, and ordering costs against Mitchell and Probert.

Neither the complaint nor the answer were sufficient in substance. The demurrer to the complaint ought to have been sustained. The limitations on the power of a *feme covert* at the common law to dispose of her property by will are well established. Aside from property which might be put in the hands of trustees subject to her testamentary disposition, any will made by a married woman which disposed of freehold estates was entirely void. Several exceptions were ingrafted on this limitation. According to the earlier cases, if a woman lived alone and transacted business as a *feme sole*, her husband at the time having been banished, or having abjured the realm, she was permitted to exercise many of the rights enjoyed by a *feme sole*. She could sue and be sued, was held liable for her debts, and on her commercial paper might maintain necessary actions for the protection of her freehold estates, and at her death might dispose of the property of which she died seized. Coke on Littleton, vol. 1 (1st Am. ed.), § 200 ; *Countess of Portland v. Prodgers*, 2 Vern.,

p. 104; *Derry v. Duchess Mazarine*, 1 Ld. Raym. 147; *Newsome v. Bowyer*, 3 Peere Wms. 37.

By an insensible process of extension, resulting probably from a misapprehension of the basis of the principle of abjuration, the doctrine was applied to cases in which originally it was without force. Some of the English cases, as well as some of the early ones in this country, conceded to the *feme covert* the power of testamentary disposition, the power to bring suit and to contract commercial obligations, where the husband was out of the country and maintained none of the ordinary marital establishments, and exercised none of his conjugal rights. *Gregory v. Paul*, 15 Mass. 30; *Troughton Adm'rs v. Hill's Ex'rs*, 2 Hayward's Rep. 614; *Cornwall v. Hoyt*, 7 Conn. 420.

The later decisions, which reviewed most of the cases establishing a different rule, re-established the principle which inhibits a *feme covert* from doing those things as to which she was originally under disability by reason of her coverture, unless the established exceptions springing from banishment, technical abjuration or war between the different nations of their residence and allegiance were clearly shown. *Marshall v. Rutton*, 8 Durn. and East, 297; *Boggett v. Frier et al.*, 2 East, 300; *Robinson v. Reynolds et al.*, 1 Aiken (Vt.) 174; *Williamson, et al., v. Dawes*, 9 Bing. 292; *Deah v. Richmond*, 5 Pick. 461; *Vreeland's Ex'rs v. Ryno's Ex'r*, 26 N. J. Eq. 160.

It may thus be taken to be tolerably clear that unless the rule be varied by some facts other than what appear on the face of the present complaint, the decedent could not at the common law execute a will disposing of her estate. If the will is to be supported under the statutes of Colorado, she is likewise under disability to dispose of the whole of it. Her statutory testamentary power is limited to the disposition of one half of her estate as against her husband, if he be living at the time of the execution of the will. These concessions, however, do not operate to support the complaint. The common law rule which deprived the *feme covert* entirely of

testamentary power is inoperative in Colorado, since the statute expressly gives the right to the married woman to dispose of one half of her property, dying while married. Since this power is possessed by the *feme covert*, the only effect resulting from the execution of a will which disposes of all of her property without recognition of the husband's rights, is to render it invalid as to the one half of the estate, and to subject all legacies to a proper and *pro rata* deduction. *Logan v. Logan*, 11 Colo. 44; *Doane v. Lake*, 32 Me. 268.

It follows that the decree which set aside the will and the proceedings for the probate of it in the county court was entirely erroneous and cannot be sustained. According to what is contained in the record the will may have been entirely valid. The proceedings certainly must be presumed to be regular in the absence of any showing to the contrary. To reverse the decree for these errors alone would not result in an accurate disposition of the controversy. It must be reversed with directions to the court below to dismiss the complaint. This necessity springs from the absence of jurisdiction in the district court under the case as laid to enter any decree whatsoever in the premises. It is the general rule well established in this country that a court of equity will not entertain jurisdiction of a suit to set aside a will and proceedings for its probate, unless some special circumstances be averred by reason of which the general equitable jurisdiction of courts will attach. According to our constitution and the statutes which have been enacted to carry out its provisions, county courts are courts of probate, fully clothed with original jurisdiction to hear and determine all this class of controversies, and to proceed to such final determinations as shall settle the rights and interests of all parties concerned. It is not necessary to go to the extent of holding that the jurisdiction conferred by the constitution is exclusive, nor to the limit of the rule sometimes enunciated that courts of equity generally are without jurisdiction in the premises; but the conclusion can be safely rested upon the principle to which all courts subscribe that no bill for such purposes will

be entertained unless it presents some special features, or the case involves some exceptional circumstances which warrant the interference of the court upon some well recognized basis of equitable jurisdiction. Pomeroy's Eq. Jurisprudence, vol. 1, § 349; *Case of Broderick's Will*, 21 Wall. 503; *Chipman, et al., v. Montgomery, et al.*, 63 N. Y. 221; *Heirs of Adams v. Adams, et al.* 22 Vt. 50.

There was no allegation in the complaint which even tended to bring the present case within the limits of that well settled doctrine. The only substantial averments upon which the jurisdiction of the court was made to depend were those stating the marriage, the execution of the will, the death of the devisor, and the proceedings in probate. Evidently of themselves these facts suggest none of the divers grounds which are recognized as legitimate bases of equitable interference.

It is urged that the plaintiff did not prove that he was legally married to Jane Stevens. None of the evidence is before the court. It is not possible, therefore, to say whether the complainant offered that strict proof of marriage, valid by the laws of the state where it was entered into, which is essential to uphold the finding on that subject.

It is exceedingly doubtful whether the answer filed on behalf of the devisor and the executors would admit proof of what was alleged by way of defense. It contained many averments which if supported by other proper allegations might possibly have brought it within the principle of some of the adjudicated cases. *Vide Abbott v. Bailey*, 6 Pick. 89; *Gregory v. Pierce*, 4 Metc. 478; *Arthur v. Israel*, 15 Colo. 147.

It is not deemed necessary to precisely settle this question or determine the particulars with respect to which the affirmative defense was apparently insufficient. It was stricken out of the pleading, the balance of the answer was withdrawn, and a demurrer was interposed to the complaint, and on this the defense rested. What has been said with reference to it springs from the apparent importance attached to it in the

arguments by counsel. While the question may possibly re-arise in the county court, if the appellee still has a right to proceed in that forum, the facts on which the defense must rest are not sufficiently before the court to warrant an expression of a definite opinion on their sufficiency as a defense to the proceeding.

For the reasons expressed, the judgment of the court overruling the demurrer will be reversed and the cause remanded, with directions to the court below to dismiss the complaint at the costs of the plaintiff.

Reversed.

MARKELL, APPELLANT, v. MATTHEWS ET AL., APPELLEES.

1. AGENCY—RATIFICATION BY ADOPTION.

A party may not accept what has been done for him by one who is not his agent, and deny the power of the individual to act. If he adopts the acts by accepting the benefits of the transaction, he will be charged with a responsibility for the things done.

2. APPELLATE PRACTICE—IMMATERIAL ERROR.

Where the trial was to the court without a jury, and there was sufficient competent testimony to support the finding and judgment, there cannot be a reversal because the court erred in permitting to be brought to its attention incompetent evidence, for it will be assumed that this did not influence its conclusion.

3. APPELLATE PRACTICE.

That a judgment is erroneous with respect to the amount for which it was entered, does not necessarily require the remanding of the cause. The judgment may be modified and affirmed in this court.

Appeal from the District Court of Pitkin County.

Mr. CHARLES I. THOMSON, for appellant.

Mr. F. G. SALMON and Mr. F. S. RICE, for appellees.

BISSELL, J., delivered the opinion of the court.

There are no legal propositions of much difficulty to be settled and applied in determining the rights of the parties to this controversy. The application of the well settled principle of adoption or ratification will determine the whole matter. It is only needful to state the controversy to make it apparent that this principle must control the judgment.

In 1886, the appellant, Markell, and W. J. H. Miller were joint owners of the "La Salle" claim. They worked it together until early in January, 1887, when Markell, who apparently had been putting up all the expenses of operating the property, telegraphed Miller to stop work on his account. The order proceeded from a misunderstanding between the tenants in common which need not be stated. The order was disregarded in so far as it concerned the progress of the work, which Miller continued on his own account until early in July. It is unimportant to state the reasons which actuated Miller in this proceeding; the fact alone is the important element in the litigation. During the time that Miller was working the property, he incurred considerable debts which at the last date remained unsettled. Markell was a nonresident, and when he arrived in Aspen in July he entered into negotiations with Miller looking to the adjustment of their controversies. By reason of some antecedent transactions between these parties, Markell had become indebted to Miller to the extent of about \$1,600, and Miller had brought suit to enforce his supposed rights in the property, and to recover what he claimed was due him. This is an important fact to remember when the question of ratification comes to be considered. While Miller was prosecuting his operations on the property, he mined and shipped considerable ore which he sold to the appellees, J. F. Matthews & Co. According to the quite common usage among people who are working mines which produce, but do not yield enough to pay current expenses, he obtained from Matthews & Company sundry advances upon ores to be mined and shipped. The advances were made under the agreement that they should be repaid by ore to be subsequently mined, if

sufficient for the purpose. The arrangement seems to have been carried out in good faith between Miller and Matthews & Company, but the result was, that upon the conclusion of their dealings there was due Matthews & Company upwards of \$1,800. They brought this suit against Markell to compel him to pay these advances. He defended, set up his order to stop work, and insisted that he could not be held liable for the debts which Miller had contracted during the time its operations were carried on contrary to his directions and expressed wish. It is tolerably clear that he cannot be held liable on the theory of an agency properly exercised by Miller at the time the debt was contracted. If he is to be held at all it must be on the ground that he accepted and adopted Miller's acts. There is little difficulty to hold him on this principle. When he reached Aspen he entered into negotiations with Miller to adjust their differences. Miller's claim to an interest in the property seems to have been recognized, and Markell agreed that if he would forego his claim against him for some sixteen hundred and odd dollars, and settle upon the basis which he proposed concerning the interests which Miller was to enjoy in the La Salle and Harrisburg properties, he would pay all the debts which Miller had incurred during the time that he was working the property without Markell's consent. The indebtedness to Matthews & Company was not the sole obligation which Miller had contracted and left undischarged, but there were sundry other claims for supplies of various sorts held against Miller and the mine by the dealers in Aspen. These supplies included groceries and materials which are essential to mining operation. It is important to state what Miller did on the property whereby the debts accrued. There seems to be no question that it was development work which tended to the opening up and advancement of the claim as a piece of mining property. There is another very important circumstance to be stated in this connection. This claim was adjacent to what was called in that section the "Durant" property, and it was for the interest of the owners of the claims that a

drift should be run along the boundary line between the two properties. This work was done by Miller under an agreement that the Durant Company should pay for it. The work was done at a profit, and netted a thousand dollars, which was paid into the common treasury of the La Salle mine. Markell received the benefit of the expenditures which Miller made and of the money earned and paid into the treasury. There is thus an ample consideration for the agreement which Markell made concerning these debts. Unless there be some legal obstruction to a recovery he should be held liable under his agreement. The recovery can easily be supported. A party may not accept what has been done for him by one who is not his agent, and deny the power of the individual to act. In other words it is settled by the authorities that it is enough to charge the principal with a responsibility for the things done, if he adopts the acts by accepting the benefits of the transaction. In this case work was done on the property to its advantage; Markell got the benefit of the profits from running the line drift between the La Salle and Durant claims; he agreed to accept the benefit of the ore which had been shipped to Matthews & Company at the time of his agreement with Miller, and he was released from a liability to Miller amounting to upwards of \$1,600. Under all these circumstances it must be held that Markell so far ratified Miller's acts that he became liable for the debts which he agreed to pay.

During the progress of the trial it was sought to prove the making of the advance which was the real cause of action by the production of a note to Matthews & Company, executed in September following the agreement, and running as the individual promise of Miller to Matthews, Webb & Company. It was for a certain sum at 2 per cent interest signed by W. J. H. Miller, Manager, and by W. J. H. Miller. It was strenuously objected that this note was not competent evidence against Markell, and in no manner tended to establish his liability for the claim sued on. The objection was well taken and the note should have been excluded. There is no

force in the contention that an exception was not sufficiently taken to the introduction of the evidence. The case was tried to the court without a jury. The objection taken was not a general one, but was specific and raised the precise questions which are now presented for determination. The court admitted it, subject to the objection which was to be disposed of on the final hearing. Judgment passed against Markell, an exception was duly taken, and it must be held that this sufficiently saves the question to entitle the party to raise it on the appeal. Whatever error was committed in this regard cannot operate to reverse the judgment. The note was wholly unnecessary to the maintenance of the plaintiff's cause of action. This was sustained otherwise by sufficient competent testimony. It was clearly proven that Miller and Matthews & Company entered into an agreement concerning the shipment and purchase of the ore. The money sued for was shown to have been advanced by Matthews & Company. Markell adopted the agreement, accepted its benefits and promised upon a sufficient consideration to repay the money. Since there was sufficient competent testimony to support the finding and judgment of the court, and the case was tried without the intervention of a jury, there cannot be a reversal because the court erred in permitting to be brought to its attention incompetent evidence. It will be assumed that this did not influence its conclusion.

The court entered judgment for an erroneous sum. There was some evidence offered which tended to prove that at the time Miller got the advances he agreed to pay 2 per cent per month interest for the money. Aside from the note, there was no proof of any agreement that would in the absence of express authority and ratification as to that part of the contract bind Markell to pay this interest. There was neither authority nor ratification. In this respect the judgment is erroneous. This error does not require us to send the case back for the entry of a proper judgment. It can be entered here and the rights of the parties properly protected and conserved.

The judgment will therefore be modified and affirmed. It is ordered that the interest included in the judgment in excess of the statutory rate be deducted from the amount of the judgment as entered, and that final judgment be entered in this court for the amount of the claim and statutory interest to the time of the entry, and that the costs of the appeal be divided between the parties.

The judgment is modified and affirmed.

Affirmed.

CURR, APPELLANT, v. HUNDLEY, APPELLEE.

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1. APPELLATE PRACTICE.

An objection to testimony will not, in general, be considered in a court of review, unless the record shows that the grounds of such objection were fairly presented to the trial court. It is only where the testimony is wholly inadmissible for any purpose that a general objection will suffice.

2. NEGLIGENCE.

A party, in the exercise of a right upon his own land which involves danger to the property of his neighbor, is bound to provide against such by all reasonable prudence and care. The giving of notice of an intention to exercise the right does not relieve him of this duty.

3. INSTRUCTIONS.

If the instructions, as a whole, convey to the jury the correct rule of law applicable to the question to be determined by them, the judgment will not be reversed because some one of them fails to state the law with sufficient qualification, when the defects are cured by other instructions.

Appeal from the District Court of El Paso County.

Messrs. LUNT & ARMIT and Messrs. WOLCOTT & VAILE,
for appellant.

Mr. T. A. McMOBBIS and Mr. WILLIAM HARRISON, for
appellee.

RICHMOND, P. J., delivered the opinion of the court.

Plaintiff, Hundley, was the owner of lot 6, block 31, in the city of Colorado Springs, and defendant, Curr, owned lot 7 immediately south of lot 6. Plaintiff alleges that for more than a year last past there was standing upon this lot a brick building which was used by him in conducting the livery business.

That in October, 1890, plaintiff and defendant entered into an agreement whereby, in consideration of \$400 paid and for other good and valuable considerations, the defendant agreed that he would not build upon or obstruct any portion of a strip of land two feet wide lying between the lines of lots 6 and 7.

That after making said contract, defendant proceeded to erect a building on lot 7, and that in so doing built on and otherwise obstructed portions of the land mentioned in the agreement contrary to the terms thereof.

That, in excavating for the cellar and foundations of said building on his lot, he wrongfully dug under the surface of the land described in the contract, and *under plaintiff's foundation* and removed the soil therefrom.

That the work was carelessly and negligently performed, and that, by reason of such negligence and want of care and other wrongful acts, the foundation of plaintiff's building gave way, the south wall was cracked and a portion thereof fell to the ground, and plaintiff's building was otherwise greatly and permanently injured.

That he had expended in repairing the damages \$1,387.75, and was otherwise permanently injured in the sum of \$1,000, and that his business was injured to the extent of \$500.

Defendant answers, sets up the contract and further alleges that he gave due notice of his intention. Denies the negligence, and alleges due care and caution, and that plaintiff was guilty of contributory negligence in the construction of his building and failure to take the necessary steps to protect his wall from possible injury liable to result from the excavation.

A counterclaim is set up by the defendant in his answer, wherein he claims \$300 from the plaintiff, alleging that the plaintiff's building was on the soil of the defendant and was constructed of defective materials, and that he had failed to protect his wall, which fell in and upon the lot of the defendant and thereby delayed him in the construction of his own building.

Trial was had and resulted in a verdict for the plaintiff in the sum of \$2,237.75.. Motion for a new trial overruled and judgment entered upon the verdict. Appeal prayed to this court.

The errors assigned are to admitting improper evidence, rejecting proper evidence, refusing instructions asked and instructions given.

It is insisted that the court erred in allowing the plaintiff to testify to what in his judgment was the permanent damage to his building.

We are inclined to the opinion that the appellant is not in a position to raise this question, for the reason that the objection to the question as well as to the answer was not specifically stated. The rule is that an objection to testimony will not in general be considered in a court of review, unless the record shows that the grounds of such objection were fairly presented to the trial court. It is only where the testimony is wholly inadmissible for any purpose in the case that a general objection will suffice. *Ward v. Wilms*, 16 Colo. 86; *Lothrop v. Roberts*, 16 Colo. 250.

The objection made was not to the question or its form, but to the qualification of the witness. Had the objections been specifically stated they might have been obviated or sustained, and in addition to this, the record shows that other testimony without objection was given supporting the estimate made by the plaintiff, and amply supporting the conclusion reached by the jury. If, therefore, the court erred in admitting the testimony of plaintiff in answer to the question, it is not sufficient to warrant us in reversing the judgment.

The next assignment of error is that the court erred in excluding evidence offered in support of defendant's counterclaim.

We assume from the record that the action of the court in excluding evidence of damages set forth in the counterclaim was based upon its conclusion that the matters and things alleged did not constitute a counterclaim. Whether this be true or not, it is wholly unnecessary for us to determine, in view of the fact that the answer sets up as a defense to plaintiff's right of recovery the same matters as constituting contributory negligence on the part of the plaintiff, and evidence in support of these allegations to show contributory negligence was given without objection and received the consideration of the court in its instructions, as well as the consideration of the jury which found against the defendant. If they did not constitute contributory neglect they certainly would not constitute the subject-matter of a counterclaim, but by this we do not mean to be understood as deciding that contributory negligence can be asserted as a ground of recovery by way of a counterclaim on the part of a defendant.

It is claimed that the defendant had a right to excavate his lot for the purpose of building on it, and that he used ordinary care and skill in making his excavation, and took reasonable precaution to sustain plaintiff's land, and hence was not responsible for any damage done thereto. And that it was the duty of the plaintiff to protect his land and buildings, after having received notice of defendant's intention to excavate and build. This question was submitted to the jury by the court and passed upon by them. And, besides, it can be said that the record does not satisfactorily show that the plaintiff had sufficient knowledge of the fact that the defendant was digging his foundation in such a manner as to render it possible that the injury complained of would result, and against which he was obligated to provide.

The testimony shows that in making the excavation the defendant dug under the two-foot strip, as well as under the wall of the plaintiff. Of course this is a controverted prop-

osition, but nevertheless it seems to us that there is sufficient evidence to support the verdict of the jury that the defendant was guilty of negligence in this particular.

In the case of *Conboy et al. v. Dickinson*, 92 Cal. 600, a similar question was presented, and the court took occasion to say that the giving of the notice cannot relieve the defendant of any portion of the prudent care with which he must have conducted the work in the absence of the statutory provision requiring notice. His excavation must be such as would not have caused the soil of the adjacent lot to tumble in had it remained in its natural state, not built upon.

In the case of *Hummell v. Seventh Street Terrace Co.*, 20 Or. 401, it was held that, "A party, in the exercise of a right upon his own land which involves danger to the property of his neighbor, is bound to provide against such by all reasonable prudence and care.

Where a defendant undertakes to construct a retaining wall on his own land which materially increases the risk of the adjoining property to land slides, he is bound to exercise his right in a way not to expose the property of the plaintiff to any risks which might be provided against by the exercise of ordinary diligence."

This seems to be the rule laid down by all the authorities and a rule that was observed by the court in its instructions to the jury, of which some complaint is made in the argument. The criticisms of the argument were directed mainly to two instructions, one of which examined separately would need to be qualified. But it is our duty under the repeated decisions of the supreme court of this state to consider all the instructions together and when the record discloses that an instruction in the series, although not stating the law explicitly, is qualified or explained by others so that the jury will not be likely to be misled, the defect will be obviated. If the instructions as a whole convey to the jury the correct rule of law applicable to the question to be determined by them, the judgment will not be reversed because some one of them fails to state the law with sufficient qualification

when the defects are cured by other instructions. This is the rule laid down in the case last cited, and is the rule of the supreme court of this state and of this court. *Hurd v. Atkins*, 1 Colo. Ct. of Appeals, 449.

We do not think it necessary to set out the instructions complained of, as we have carefully examined the entire charge and reached the conclusion that the instructions are as favorable to the defendant as it was possible for the court to give. We may say, we think they show a strong inclination on the part of the court to lean toward the defendant and support his defense. The instructions asked by the defendant were properly refused. They did not embrace the law applicable to the pleading and the evidence, but, so far as they did, the court certainly included them in the instructions given.

The jury have by their verdict concluded that the defense of contributory negligence on the part of the plaintiff was unsupported by the evidence, and that the defendant was guilty of such negligence, carelessness and want of prudence as to render him liable for all the damages resulting therefrom, and there is evidence sufficient in our judgment to support this verdict; therefore it will not be disturbed.

The judgment is affirmed.

Affirmed.

LEWIS ET AL., APPELLANTS, v. DODGE, APPELLEE.

1. APPELLATE PRACTICE.

Where no exceptions were taken to the instructions given and they are not embraced in the record, an objection that the court erred in its instructions will not be considered.

2. EVIDENCE.

The various agreements between the parties which showed the contract as originally entered into and as extended in its operation and conditions, and which were the result of the conversations wherein the

alleged misrepresentations, which are the foundation of the action, were made, are admissible in evidence.

Appeal from the District Court of Chaffee County.

Mr. G. K. HARTENSTEIN, for appellants.

Mr. C. S. LIBBY, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

In March, 1886, Nathaniel T. Dodge and one C. F. Holt entered into a contract with Georgie C. Lewis for the purchase of a ranch and shares of stock in an irrigating ditch. At the time of entering into the contract J. H. Lewis, husband of Georgie C. Lewis, represented to Dodge and Holt that the ditch company in which they were buying stock was free from debt and without incumbrance, save and except in the sum of \$75.00 or \$80.00. Relying upon these representations Dodge and Holt executed with Georgie C. Lewis an escrow agreement, wherein it is recited that "the deed to the premises is to remain with one V. C. Gunnell, and to be delivered on or before the 1st day of December, 1886, conditioned that Dodge and Holt shall pay to Mrs. Lewis \$1,500 with interest at 10 per cent, or pay on or before December 1st, \$500 and execute notes with a deed of trust upon premises to secure payment of balance." It is also provided in the agreement that ten shares of the Harmony Ditch Company's stock shall be delivered to Dodge and Holt, together with the deed of conveyance.

The provisions of this contract were not fulfilled, but in July another escrow agreement was entered into wherein it was provided that if Dodge and Holt, or anyone for them, or their assigns, should on or before the 1st day of December, 1887, pay to Mrs. Lewis \$1,740.70, then the deed and shares of stock should be surrendered. The conditions of this agreement were not fulfilled and a subsequent writing was made by Georgie C. Lewis in which the time for payment was ex-

tended, and wherein it was agreed that if they should pay the sum last mentioned on or before December 1st, and the further sum of \$500, then the deed to the land together with ten shares of the Harmony ditch stock should be delivered.

In this last contract it is recited that if the shares of stock shall be in any wise incumbered or liens put thereon on account of Georgie C. Lewis, then said parties may pay off the indebtedness and the amount so paid be deducted from the amount to be paid by them for the stock.

Under the agreement Holt and Dodge were let into possession of the premises and farmed them for some period of time. They afterwards assigned their right to purchase to one Charles Day. About this time they discovered that the ditch company was indebted in the sum of \$700 or more, and in order to make their contract good to Day, they paid him the sum of \$244.88.

The record discloses the fact to be that J. H. Lewis, acting for his wife in the negotiations between the parties, represented the ditch free from incumbrance or debt with the exception of this \$75.00 or \$80.00. And that Dodge and Holt relied upon these representations. Notwithstanding the representations the truth was that there was an indebtedness of over \$700, evidenced by note and secured by a deed of trust, which was not placed of record until after the assignment by Dodge and Holt to Day, and that it sufficiently appears that this sum of money was due to Georgie C. Lewis, and that both J. H. Lewis and Georgie C. Lewis knew at the time of the existence of the indebtedness and the deed of trust.

This action was brought by Dodge to whom Holt had assigned his interest to recover this sum. The cause was tried to a jury and verdict rendered for the plaintiff in the sum claimed with interest. Appellant insists that the judgment should be reversed because of errors of the court in admitting testimony over their objection, in refusing testimony offered, and in the instructions to the jury.

No exceptions were taken to the instructions to the jury, nor are the instructions embraced in the record. This of

course eliminates from our consideration any question relative to them.

The further contention of appellant is that the court erred in admitting in evidence the various agreements made between the parties. We cannot agree with this contention. The agreements were a part of the transaction. They were the result of the conversations between Dodge and Holt and J. H. Lewis, wherein the alleged misrepresentations were made. They showed the contract as originally entered into, and as extended in its operation and conditions. This of itself rendered them admissible and we think absolutely essential to entitle plaintiff to recover.

The further contention of appellant is that the representations made by J. H. Lewis did not bind his wife, because it does not appear from the testimony that Lewis was acting as his wife's agent. The record does not support appellant's contention. Lewis himself testifies that he did act as the agent of his wife in the transaction. It is true that this is not directly shown by plaintiff's testimony, and if the defendant had not cured the omission by his own testimony the probable result would have been that the judgment would have to be reversed, although we are inclined to the opinion that the circumstances as detailed by the witnesses on behalf of the plaintiff would warrant the conclusion, without direct proof that the relation of principal and agent existed between the wife and husband.

It is further insisted that the court erred in rejecting testimony offered on the part of the defendant to prove certain facts growing out of subsequent dealings between Day and Mrs. Lewis. The testimony offered had no relation to the transaction upon which the suit was based. It did not tend to establish the defense set up and consequently was inadmissible. So far as we can gather from the record the cause appears to have been fairly tried, and the jury having reached the conclusion that the misrepresentations were made by J. H. Lewis while acting as the agent of his wife, and that the representations were relied upon by Dodge and Holt and

that they were entitled to their damages, and this conclusion being supported by ample proof, we would not be warranted in disturbing the judgment.

The judgment must be affirmed.

Affirmed.

THE COLORADO LOAN & TRUST COMPANY ET AL., PLAINTIFFS IN ERROR, v. THE GRAND VALLEY CANAL COMPANY, DEFENDANT IN ERROR.

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1. FORGERY.

Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.

2. EQUITABLE ESTOPPEL.

Where one, by his words or conduct, willfully causes another to believe a certain state of things and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

Error to the District Court of Arapahoe County.

THIS was a suit in equity brought by the defendant in error to enjoin the sale, quiet title and cancel conveyances of certain lands and water rights in Mesa county. The Grand Valley Canal Company was a corporation operating an irrigating canal, selling lands, water rights, etc. It is alleged in the complaint that on the first day of Dec., 1884, defendant in error made and delivered to one Lucius Cost deeds purporting to convey the lands in controversy, together with certain water rights; that on the same date, Cost conveyed the same property in trust to the Colorado Loan & Trust Company, as trustee, to secure the sum of \$1,000 borrowed or to be borrowed. The trust deed was filed for record on the 3d day of December, 1884. G. P. Bissell & Co. of Hartford, Conn.,

bought the notes for \$1,000 made by Cost, secured by the deed of trust above mentioned, the money going to the use of The Grand Valley Canal Company. On the 1st of November, 1884, a deed of trust was made by The Grand Valley Canal Company, conveying all its property, including the land in controversy, to Gustavus F. Davis, trustee, to secure bonds to the amount of \$200,000, issued by the company and put upon the market for sale. Whether or not they were all sold we are not informed, but a part, (amount not shown,) were purchased by The Travelers Insurance Company. Default having been made by The Grand Valley Canal Company The Travellers Insurance Company on the 9th day of March, 1888, brought a suit to foreclose. On July 21, 1888, a decree of foreclosure was entered, which was followed by a sale of the property, which was purchased by The Travelers Insurance Company, which afterwards sold and conveyed the property to The Colorado Loan & Trust Company. Bissell & Co. attempted to enforce their lien upon the land in question to satisfy the Cost notes, and this suit was instituted for the purposes above stated. The Grand Valley Canal Company was the successor of The Grand River Ditch Company. In regard to the trust deed of Bissell & Co. it is alleged in the complaint: "That on the 1st day of December, 1884, pretended conveyances of the property in controversy were executed by The Grand River Ditch Company to one Lucius Cost. Plaintiff is informed and believes that the conveyances were a forgery. That some one, not authorized, signed the name of T. C. Henry, the president of The Grand River Ditch Company, to the deeds, and that the deeds were never acknowledged by Henry, and that the deeds were not the deeds of The Grand River Ditch Company."

The answer fully denies the allegation of forgery of the deeds, etc., and alleges: "That C. P. Bissell & Co. in good faith paid out the money on the notes secured by the deeds of trust, executed by Lucius Cost to The Colorado Loan & Trust Company. That the notes of said Cost were negotiated and sold to said Bissell & Co. by T. C. Henry, the presi-

dent of The Grand River Ditch Company, and that T. C. Henry, as such president represented to Bissell & Co. that all the deeds were good and valid, and that Bissell & Co. relied upon such representation."

A trial was had upon the issue involved, and a large amount of testimony taken. On the 22d of January, 1891, the cause was submitted. On the 26th of January, 1891, there was a finding for the plaintiff and a decree finding that Cost had no title, and the trust deeds made by him were invalid and void, and allowing the injunction. To reverse such decree a writ of error was sued out to this court.

Mr. J. P. BROCKWAY, for plaintiffs in error.

Mr. WM. R. BARBOUR, for defendant in error.

REED, J., after stating the case, delivered the opinion of the court.

It will be observed that only one issue is made by the pleadings, viz., the validity of the deed from The Grand Valley Canal Company to Cost. The validity of the trust deed, made by Cost, is dependent upon his title, hence, only the validity of his title is involved. By the pleading and the conduct of the entire case, it appears to be conceded that the Cost security would, if valid, be prior to and take precedence of that of the other parties, consequently, this issue of validity is the only one to be determined. There is another insisted upon in argument, but not presented by the pleading, which will be examined hereafter.

The allegation in the complaint is, "that the conveyances were a forgery; that some one not authorized signed the name of T. C. Henry, the president of the Grand River Ditch Company, to the deeds, and that the deeds were never acknowledged by Henry, and that the deeds were not the deeds of The Grand River Ditch Company." A novel and very peculiar case is made in evidence. It is not pretended

that Cost or anyone in his interest committed the forgery, or was guilty of any irregularity whatever in the entire transaction, or during his life had any knowledge of the present supposed irregularities. It is conceded that the land was regularly purchased by him from the Ditch Company and an agreement made by it to convey to him. Taking the case as claimed to have been made by the evidence and we have the anomalous one of the officers and managers of a corporation forging a deed to its own property to close a legitimate sale and execute a contract, and setting up its own fraud to defeat its conveyance. The fraud attempted to be proved, it will readily be seen, was not the fraud of the grantee upon the company but the fraud of the company upon its grantee, who acted in good faith—neither participated in nor had knowledge of it.

A brief examination of the evidence of plaintiff in error and of the officers of The Grand Valley Canal Company when called for the defense is necessary. T. C. Henry was president of The Grand Valley Canal Company, the defendant; when called by the plaintiff in error, he testified nothing whatever in regard to the supposed forgery of his name to the deed—a fact that should not pass without comment. It was the only issue in the case, and, if a forgery of his name, he was certainly the most competent witness to establish the fact, yet in such examination the subject of the forgery was studiously avoided. When called and examined by the defense, he stated: that he, as president of the defendant, made the contract with Cost for the sale and conveyance of the land to him. “I don’t recollect particularly the time and circumstances under which those particular deeds were executed. I remember well the agreement and transaction that culminated in that transaction. Perhaps if I were to see the deeds I should recall some more of the circumstances connected with it.” He had not seen the original deeds of the land since they were executed and delivered. The deeds for water rights from the company to Cost, which were a part of the same transaction, and were shown him, he iden-

tified as having been executed by him. He testified: "My present recollection is that—in fact, I know that it was my practice to sign papers, when I was an officer, in blank and leave them in possession of a notary public, to be used as occasion might require;" and in regard to those particular deeds, "My present recollection is that I left deeds probably signed many months before this time, in the possession of the notary who was in the office, Mr. Rees, in his presence."

"Q. Do you know who prepared the deeds that you made in this matter? A. No, sir; without looking at them.

"Q. Did you do it? A. No, sir, I signed them in blank."

H. J. Aldrich, secretary and treasurer of the company, on behalf of the plaintiff:

"Q. Did you have authority to sign Mr. T. C. Henry's name, the president, to deeds in his absence? A. I did.

"Q. And were you accustomed to sign deeds in his absence? A. I did such things on some occasions. It didn't amount to a custom, but I did it sometimes.

"Q. Now, when you would sign Mr. Henry's name to deeds in his absence, what would be done in reference to having them acknowledged? A. Well, I don't recall any instance when I signed his name, but still I think it was done in some instances.

"Q. Now, when you signed Mr. Henry's name as president to an instrument, would you hand it to Mr. Rees, and would he certify that it was acknowledged before him as a notary public? A. I don't know whether he did or not, and I don't know as I ever handed any to him." When called by the defendant he testified:

"Q. I will ask you to look at the signature to these three instruments, and say whose signature it is, if you know? (Three papers handed to witness.) A. I should say they were the signature of T. C. Henry.

"Q. How well are you acquainted with T. C. Henry's signature; how many times have you seen it? A. A very great number of times.

"Q. Have you seen him sign his name a very great num-

ber of times? A. Yes, sir; I am as familiar with it as I am with my own.

"Q. And you say that this signature is the signature of T. C. Henry, do you? A. That would be my judgment.

"Q. I believe you said that in some cases you were authorized by Mr. Henry to sign his name in his absence? A. I was.

"Q. Do you remember the transaction of the giving of the deeds to Lucius Cost by The Grand River Ditch Company, which has been mentioned here? A. Yes, sir.

"Q. Do you remember about the negotiation of the notes and deed of trust given by Lucius Cost to Messrs. Bissell & Co., the defendants here? A. I do.

"Q. Did you take part in that negotiation? A. I did.

"Q. On whose behalf were you acting in negotiating those notes and selling them to Bissell & Co.? A. In behalf of The Grand River Ditch Company.

"Q. When the notes were negotiated, who received the money? A. The Grand River Ditch Company.

"Q. What consideration was moving from The Grand River Ditch Co. to Lucius Cost in the warranty deeds to the land in controversy, that were delivered to him? A. The title to the land.

"Q. What was the consideration moving from Cost to The Grand River Ditch Company? A. The trust deed.

"Q. Anything else? A. And the title, if I understand that question.

"Q. In other words, what did Lucius Cost pay The Grand River Ditch Company for this land; what did he give for it? A. I don't remember what the consideration was. You mean how much it was?

"Q. In other words, what did the Grand River Ditch Company receive from him? A. They received a deed of trust.

"Q. Well, what else besides the deed of trust; what goes with the deed of trust, in other words? A. Why, a note and deed of trust.

"Q. They received Mr. Cost's two notes and the deeds of trust? A. Yes.

"Q. And you have already stated, as I remember, when those notes were negotiated, the money was received by The Grand River Ditch Company? A. Yes, sir.

"Q. Do you remember how the deeds were delivered to Lucius Cost? A. I do not.

"Q. You know that they were delivered, however? A. I know that they were delivered; yes.

"Q. Do you know, Mr. Aldrich, whether or not any other officer or director of The Grand River Ditch Company knew of the making of these deeds to Lucius Cost, and the loaning of this money, and the reception of it from Bissell & Co. for the benefit of The Grand River Ditch Company, as you have stated? A. I knew Mr. Henry and Mr. Coulson.

"Q. Were Mr. Henry and Mr. Coulson both directors of The Grand River Ditch Company? A. They were.

"Q. And Mr. Henry was its president? A. He was."

Mr. Barrows, who was a clerk in the loan department of the defendant in error, was called, and testified for both parties, in effect, that he, as clerk, prepared all the deeds in question, four or five in number, and delivered them to Mr. Aldrich, the secretary; also, prepared the deed of trust from Cost upon the land and the notes; also, that he filled up the application for a loan. The deeds testified to embraced those to water rights conveyed at the same time from the company to Cost. Here his testimony upon this part of the controversy stops. He does not say whether the name of Mr. T. C. Henry had been previously written by Henry on the blanks used, or whether the signature was blank, nor does he testify who signed the name of Mr. Henry. The impression from his testimony would be that the name of Mr. Henry was written by Mr. Aldrich or some one else, and not by Mr. Henry, but here is a clash between his testimony and that of Henry. Barrows testifies to the making out by him of all the papers, water deeds included, and that they were all in the same condition when delivered to Mr. Aldrich, the secre-

tary, while Henry upon the stand has sworn to the deeds to the water rights and sworn that his name to them was written by himself; the deed to the land was not there. Taking all the testimony, it is perhaps unnecessary to say, that it fails to show the perpetration of any crime or fraud or any attempt or intention to perpetrate either. There is an absolute lack of proof of intention, which is an indispensable element. If the evidence establishes anything, it is of an irregular manner of transacting business, a want of technical compliance with the requirements of the law in regard to the conveyance of real estate. We do not wish to be understood as intimating that strict compliance with the statutory requirements can be dispensed with, and that if the supposed facts and irregularities had been satisfactorily established they would not have vitiated the conveyance. But here we have the anomaly of three different officers of a corporation who had exclusive control of the conveyancing, testifying, when called, to discredit their own conveyance to three different and incompatible sets of facts in the same transaction and establishing neither.

Forgery is defined to be "the fraudulent making or alteration of a writing, to the prejudice of another man's rights." 3 Greenlf. Ev. § 103.

"A false making or making *malo animo* of any written instrument for the purpose of fraud and deceit." 2 Russ. Crim. Law, 318; *Com'wlth v. Ayer*, 3 Cush. (Mass.) 150.

"To constitute this offense it is also essential that there be an intent to defraud." 3 Greenlf. Ev. 103; 4 Black. Com. 247.

"It is the false making or materially altering, *with intent to defraud*, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 1 Bish. Crim. Law, § 572.

It will readily be observed that there was no forgery—the intention to defraud was entirely lacking, which is the very basis of the crime. The property conveyed was that of the party who is charged with the forgery. The owner cannot

be guilty of forgery in the execution of a conveyance of his own property for the benefit of another in pursuance of a legitimate contract of sale. It may have been irregular, lacking in legal formalities, which would have avoided it if challenged by a *bona fide* purchaser, without notice of its existence, and that is the most that could be said, even if the plaintiff in error had fully established the irregularity attempted.

The testimony of the officers of defendant conclusively shows that Cost's application for the loan was made to The Colorado Loan & Trust Company direct; that Cost was not to receive the proceeds of the loan; that The Grand Valley Canal Company was to be the beneficiary through the plaintiff in error, and that the proceeds of the loan went through the office of the plaintiff in error.

Mr. Henry said: "I don't now recollect whether the notes were sent to me, or sent from the office of The Colorado Loan & Trust Company direct to Mr. Bissell; but the applications were sent to me, which stated the basis of the loan, and I negotiated for the loan as called for in the application." This fully fixes these important facts: First, the knowledge of the plaintiff in error of the entire transaction; second, its participation in securing the loan, giving credit to the securities and getting the money from Bissell & Co.; third, the participation of the officers of the defendant in error, and that its president personally negotiated it, and, of necessity, indorsed and vouched for its legitimacy and validity, consequently, the plaintiff cannot claim to have been an innocent purchaser under the other trust deed without knowledge of the lien of Bissell & Co., nor can the defendant in error set up its own irregularities to defeat a security that both plaintiff and defendant were connected with, and placed upon the market and received the proceeds of.

It is contended in argument that prior to the conveyance to Cost The Grand Valley Canal Company had conveyed all its property, including the land conveyed to Cost in trust, to secure the payment of \$85,000 borrowed; that such indebt-

edness remained unpaid and became a part of the \$200,000, the subsequent loan, which was to that extent a renewal, and being such took precedence of the Cost conveyance. No such allegation is contained in the pleading nor any issue. The allegation is that the property was conveyed to Davis (trustee) "to secure the payment of its bonds in the sum of \$200,000." Another difficulty arises. If the contention could prevail, it could only be effective as to the \$85,000. The Cost claim could not be subrogated to the entire \$200,000, as attempted in argument. Neither in pleading nor argument is there an effort made to make the \$85,000 superior to, or to separate it from, the remaining \$115,000, so as to give it precedence of the Cost claim.

The equitable principle contended for and sustained by the numerous authorities cited is clearly correct, where it can be invoked and made applicable, but in our view of the present case, it cannot avail under either the facts or pleading.

We conclude, first, that the plaintiff in error, having had full knowledge of the Cost transaction, and having participated in the placing of the security with Bissell & Co. and in establishing its regularity, is precluded and estopped to assert its invalidity and give its own claim precedence. The application for the loan was made by Cost directly to the plaintiff in error; the defendant in error was to and did receive the proceeds through the plaintiff in error. The legal title of Cost was conveyed to the plaintiff in error to secure the notes. The placing of the security with Bissell & Co. was done by plaintiff in error through the agency of Mr. Henry, who testified to the fact, but did not recollect whether the securities were sent by plaintiff to him or directly to Bissell & Co. The proceeds went in the first instance directly to the plaintiff in error. It does not appear in evidence, but the notes and trust deed having been made directly to the plaintiff, it is evident the notes could only have passed to Bissell & Co. by the indorsement or assignment of plaintiff. These being the facts there is no question of the applicability of the law of estoppel, "*estoppel in pais*," or "equitable es-

toppel." The rule as deduced from all the authorities, and which is as well established as any general rule of law, is "*Where one, by his words or conduct, willfully causes another to believe a certain state of things, and induces him to act upon that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.*"

The leading case is *Pickard v. Sears*, 6 Adolph. & E. 469. See also, *Heane v. Rogers*, 9 Barn. & Cress. 576; *Graves v. Key*, 3 Barn. & Ad. 318; *Keate v. Phillips*, 18 L. R. Ch. Div. 577.

The American rule as stated in *Branson v. Wirth*, 17 Wal. 42, is in effect the same. Mr. Justice Bradley states it, "If one person is induced to do an act prejudicial to himself in consequence of the acts or declaration of another on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations." The same rule, in effect, though differing somewhat in phraseology, had been applied in the courts of every state. The application of this well settled principle would estop the plaintiff in error from asserting the invalidity of the security in the hands of Bissell & Co., regardless of the finding as to title in the transactions between defendant in error and Cost.

Second. That no case was made by the evidence in regard to the conveyance by it to Cost to invalidate his title and the security by him made. If fraudulent, they were the frauds of the company, of which he had no knowledge and in which he in no way participated, and certainly could not invalidate the security in the hands of Bissell & Co., where the company had placed it, and had received and appropriated the proceeds to its own use. It follows that the district court erred in finding the securities executed by Cost void in the hands of Bissell & Co.

The decree will be reversed and the cause remanded.

Reversed.

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**THE ESTES PARK TOLL ROAD COMPANY, PLAINTIFF IN
ERROR, v. EDWARDS, DEFENDANT IN ERROR.**

1. GRANT OF RIGHT OF WAY.

Sec. 2477, U. S. Rev. St. grants the right of way for the construction of highways over public lands not reserved to public uses.

2. GRANT, HOW ACCEPTED.

The construction of a highway over public lands is an acceptance of the grant, and is all that is necessary to pass the government title to the right of way, subject to defeasance in case of abandonment.

3. RIGHT OF WAY, PROPERTY.

After the grant takes effect, the way so appropriated ceases to be a portion of the public domain, and becomes the property of the road company.

4. SAME.

The fact that the county commissioners have supervisory control to regulate the tolls to be collected, neither divests, defines nor modifies the ownership of the road company in the right of way.

5. TAXATION—RIGHT OF WAY SUBJECT TO.

The roadbed and right of way of a toll company is property and subject to taxation.

Error to the District Court of Larimer County.

THE facts in the case appear by stipulation of the parties, as follows: "First. That the plaintiff is the duly elected and qualified treasurer of Larimer county, and as such is authorized to collect the taxes in and for said county. Second. That the defendant is a corporation organized under the laws of Colorado for the purpose of constructing toll roads, and prior to the 1st day of May, A. D. 1888, it had constructed, and was and ever since has been in possession of, a certain road in said county, extending from Little Elk park, in said county, to Estes park, in said county, a distance of about fourteen miles; and then and there was, and ever since has been, collecting tolls of persons traveling over said road, according to rates prescribed by the county commissioners of said county of Larimer. Third. That the said toll road was constructed by the defendant about the year 1876, and was situated for

the whole distance upon the public domain of the United States. Fourth. That on the said 1st day of May, A. D. 1888, and at all times, the defendant had no property in said county of Larimer save and except said toll road, and that the same is, and at all times has been, a highway over which the public has had right to travel upon the payment of toll, and that the only interest of the defendant therein is the right to collect tolls thereon as hereinbefore stated, and such rights, if any, as inured to it by reason of its constructing, operating, and maintaining its said road as aforesaid. Fifth. That the principal office of the said defendant is kept in Longmont, in the county of Boulder, in the state aforesaid, and all of the stockholders of said corporation are residents of the said county of Boulder. Sixth. That the assessor of the said county of Larimer for the year 1888, in making the assessment roll of said county, made and carried upon said roll a list in substance as follows: 'The Estes Park Toll-Road Company, its road, including roadbed and right of way in Larimer county; value \$1,000,—by the assessor;' and that said assessment roll, with the list so included, was delivered to the county clerk of said county at the time and in the manner required by law. Seventh. That the taxes for said county were levied by the county commissioners at the time and in the manner required by law. Eighth. That the tax list of said county was made out by the county clerk of said county at the time and in the manner required by law, and the amount of the tax assessed upon the said list as so returned by said assessor against the defendant was \$21.00. Ninth. That said tax list was made out and delivered to the treasurer of said county at the time and in the manner required by law, and is now in his hands for collection; and that no part of said tax has been paid by the defendant. The point in controversy between the parties, and upon which the decision of the court is asked, is: Is the said 'road, including roadbed and right of way,' property subject to taxation in said county? It is agreed that, should said point in controversy be answered in the affirmative, judgment may be entered against the defendant

for the said amount of \$21.00, the amount of said tax, and interest thereon at 2 per cent per month from January 1, 1889 ; otherwise the defendant shall go hence without day." There was a finding and judgment in favor of the county for \$24.75.

Mr. B. L. CARR and Mr. F. P. SECOR, for plaintiff in error.

Messrs. ROBINSON & LOVE and Mr. SANFORD DARBAH, for defendant in error.

REED, J., delivered the opinion of the court.

It is contended that the court erred ; that the plaintiff in error had no property in the road ; that such road was under the absolute control of the public,—was a public highway, and as such was not taxable. It is said : " The road is constructed across the public lands of the United States, and the right of way therefor is granted by congress to the public." Again : " The title to the ground occupied by said roadbed is in the United States ; the right to use it is in the traveling public. The only right the company has is to collect tolls at rates prescribed by the county commissioners, sufficient, presumably, to compensate for the first outlay and for repairing the road." This theory seems to be predicated upon a very pardonable misconception of the law giving the right of way. Section 2477, Rev. St. U. S., is : " The right of way for the construction of highways over public lands not reserved to public uses is hereby granted." By section 2339, " the right of way for the construction of ditches and canals for the purposes herein specified [mining, agricultural, manufacturing, and other purposes] is acknowledged and confirmed." Section 2340 : " All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights," etc. The language used in regard to the right of way for highways is " Is hereby granted." The word " grant," in such connection, is very significant ; in fact, seems to be a key for the solution of the question in-

volved. "Grant:" "An act evidenced by letters patent under the great seal, granting something from the king to a subject." Cruise, Dig., tit. 33, 34. "A transfer by deed of that which cannot be passed by livery." Willes, Rep. 147, 149. "A generic term, applicable to all transfers of real property." 3 Wash. Real Prop. 181, 353. "A technical term, made use of in deeds of conveyance of lands to import a transfer." Id. 378, 380. "Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government." See Wash. Real Prop. 181, 208; 2 Kent, Comm. 450, 494; *Johnson v. M'Intosh*, 8 Wheat. 543; *Martin v. Waddell*, 16 Pet. 367. It is stipulated that in the year 1876 the grant was accepted, the road constructed, and has since been maintained. This grant and the acceptance were all that was necessary to pass the government title to the right of way, and vest it in the grantee permanently, subject to defeasance in case of abandonment. See *Flint etc. R. Co. v. Gordon*, 41 Mich. 420. After entry and appropriation of the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it; and the lands through which it passed were disposed of subject to the right of the road company, such right being reserved in the grant. The road company, as shown, became the owner of the right of way. By the use of its money it improved this right of way, making a highway over which the public could pass by the payment of tolls. Although the public became entitled to use the road, such right was only by compliance with the fixed regulations recognizing the ownership. The statutes also provide remedies for any interference, and it is clear that the road company could maintain trespass or other actions for any unwarranted interference with its possession and rights. The fact that the public could pass over the road at pleasure does not detract from the position here taken as long as such right was dependent upon the payment of tolls, which was a constant recognition of ownership and property. It is also clear that the company had such title as

could be sold and transferred, and the successor invested with the right of possession. "Property" is defined to be "the right and interest which a man has in lands and chattels to the exclusion of others." Bouv. Law Dict. "Applied to lands, comprehends every species of title, inchoate or incomplete. Embraces rights which lie in contract, those which are executory as well as those which are executed." Am. Law. Dict.; *Soulard v. U. S.*, 4 Pet. *512; *Delassus v. U. S.*, 9 Pet. 133; *Smith v. U. S.*, 10 Pet. 329. Tested by these well-settled principles, it will readily be seen that the contention of plaintiff that it had no tangible, taxable property in the road cannot be sustained. It had its granted right of way, together with its road, for the use of which it exacted dues. A toll road is very analogous to a railway to which congress grants the right of way over the public domain. The right of the state to tax a railway, including roadbed, track, and all betterments upon its right of way, has never been seriously questioned. It is true, a railway is not technically a public highway, but the analogy between it and a toll road, for the purposes of taxation, is so marked that they should evidently be regarded alike. See *Railway Co. v. Gordon*, 41 Mich. 429; *Rogers v. Burlington*, 3 Wall. 664; *Railroad Co. v. County of Otoe*, 16 Wall. 667. The fact that the county commissioners had supervisory control to regulate tolls can have no bearing whatever. It in no way interferes with the ownership or control; only fixes the price the public shall pay for the use of the property. The right to so regulate by virtue of the police power of the state, to prevent extortion, whether by toll roads or railways, is so well settled that discussion is unnecessary; it neither divests, defines, nor modifies ownership. Section 2847, Gen. St.: "The property of corporations and companies constructing canals, ditches, flumes, plank roads, gravel roads, turnpike roads, and similar improvements, shall be assessed to the company or corporation in the respective counties in which said improvement is situated." This, if necessary, might almost be regarded as an authoritative declaration by the legislature

of ownership and property in constructions of this kind, and of the duty of officials to assess and collect taxes. By sections 3-6 (both inclusive) of article 10 of the state constitution, all property not therein exempted is subject to taxation, and by section 2814, Gen. St., it is declared: "All property, both real and personal, within the state, not expressly exempt by law, shall be subject to taxation," etc. We conclude that the plaintiff was the owner of the property subject to the appraisal and taxation, and, not having been by law exempted, the judgment must be affirmed.

Affirmed.

TAYLOR, APPELLANT v. BUCKLEY, APPELLEE.

1. APPELLATE PRACTICE.

A verdict rendered upon conflicting testimony will not be disturbed.

2. PRACTICE.

When attachment proceedings have been instituted, and a traverse has been filed, it is not error to submit the issue to the jury for a separate finding.

3. APPELLATE PRACTICE.

Erroneous action of the court below, which was made without objection and to which no exception was reserved, does not warrant a reversal.

Appeal from the District Court of Chaffee County.

MR. G. K. HARTENSTIEN, for appellant.

MR. C. S. LIBBY, for appellee.

REED, J., delivered the opinion of the court.

Appellee was employed by appellant to perform labor on a ranch; was a carpenter. There was no question in regard to the employment and the price for mechanical labor—it was to be \$50.00 per month. Appellee was to repair wagons, tools and farming machinery; also to do some building, and repair buildings, etc. Appellant was to furnish

lumber and materials; employment commenced July 2d or 5th, terminated October 5th. A part of the time appellee was engaged in mechanical work, and a part of the time in haying and harvesting and ordinary ranch labor,—appellant failing to furnish lumber and material. The only question of importance was as to the contract of hiring; appellee claiming \$50.00 per month regardless of the character of the work upon which he was employed, appellant contending that he was only to receive \$50.00 per month for carpenter's work, and the price of ordinary ranch labor while otherwise employed. Upon this question the testimony was conflicting, but the finding was for appellee; verdict and judgment for \$155. There was a claim made and an attempt to recover for expenses and time in coming to Denver after the employment was terminated. No such claim could be allowed, and it seems to have been ignored by the jury. The time testified to at \$50.00 per month covers the amount of the verdict. The price allowed by the jury appears excessive for the character of the employment and the manner in which the party was occupied, but the question was purely one of fact, which it was the province of the jury to determine, and according to the well-settled rule of this court will not be disturbed. If it were within the province of this court, the fact might have been differently found, and a more equitable judgment entered.

Various errors are assigned, principally upon the admission and rejection of evidence. A careful examination fails to disclose any serious error. No error is assigned upon the court's instructions to the jury. Proceedings by attachment were instituted, a traverse, and an issue which was by the court submitted to the jury for a separate finding. The issue was found for appellee. It is contended that the action of the court submitting the question upon the attachment for separate finding by the jury was erroneous. We do not so regard it. It has been held by the supreme court, and this, to be the correct practice. If erroneous, no exceptions ap-

pear to have been taken to the action of the court, nor any objection made to the proceeding at the time, consequently, it cannot be reversed here.

The judgment should be affirmed.

Affirmed.

RICE ET AL., PLAINTIFFS IN ERROR, v. THE AMERICAN
NATIONAL BANK OF DENVER, DEFENDANT IN ERROR.

1. PRACTICE IN JUSTICE'S COURT.

The provisions of the statute requiring the summons issued by a justice of the peace to specify the place, day and hour at which the party summoned must appear before him, are mandatory and must be strictly pursued.

2. PROCESS, WHEN VOID.

Service of process, requiring an appearance before a justice of the peace at an impossible date, confers no jurisdiction over the person served, and a judgment based upon such service is void.

3. JURISDICTION, WHEN IT ATTACHES.

The day and hour fixed in the summons for its return is the time when the justice's jurisdiction of the action attaches, and not when he issues the writ.

4. GARNISHMENT—SCIRE FACIAS.

A valid conditional judgment is a condition precedent to the issuance of a scire facias against a garnishee.

5. GARNISHMENT.

In order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, it is essential that there be service of process, or its equivalent, and he will not be bound by an independent submission of his rights by his debtor.

6. JUSTICE'S PROCESS, WHERE SERVED.

Service of process from a justice's court cannot, under the statute, be made beyond the county, and the acceptance of service which shows that it was made outside of the county thereby shows that it was made where the process had no legal force.

7. GARNISHMENT, STATUTORY.

The authority to institute garnishee proceedings is entirely statutory, and unless the requirements of the statute are complied with, the proceedings cannot be sustained.

Error to the District Court of Arapahoe County.

Mr. R. D. THOMPSON, for plaintiff in error.

Mr. T. J. O'DONNELL and Mr. W. S. DECKER, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

By the complaint of the American National Bank of Denver, plaintiff below, it is averred in substance that on the 27th day of July, 1891, F. R. Rice and others caused to be served on the bank a writ of garnishment issued by P. L. Palmer, a justice of the peace, in a cause wherein said Rice and others were plaintiffs and one John Noonan was defendant; that by said writ plaintiff was required to appear before the justice of the peace on the first day of July, 1891, to answer whether it was in any manner indebted to Noonan.

It is also alleged that a summons and writ of attachment, which was served simultaneously with the garnishee process, was issued on the same day, and required Noonan to appear and answer on the same date; that on the 6th of August, 1891, a writ of scire facias was issued by the same justice, reciting that on the 1st day of August, 1891, the said Rice and others recovered a judgment against Noonan for the sum of \$166; that said judgment remained in full force and unsatisfied; and that on the 27th day of July the bank was summoned as garnishee to appear before the justice on the 1st day of July, 1891; that the bank having failed to appear and to answer according to the statute, a conditional judgment was entered against it for the amount of the judgment recovered against Noonan, and it was required to appear and show cause why the conditional judgment should not be made final.

It appears from the record that final judgment was entered on or about the 24th day of August of the same year against the bank for \$180.10, besides costs; that no appearance either by the defendant, Noonan, or by the bank was at any time made in the justice's court. Upon the filing of

the complaint an injunction was issued restraining the justice from further proceeding in the premises. Demurrer was filed to the complaint, which was overruled and the temporary injunction was made permanent. Plaintiffs in error elected to stand by the demurrer and prosecute this writ of error.

The sole question presented for our consideration is, whether or not the judgment entered by the justice against the defendant as well as against the bank was valid.

It is apparent from the above recital that the process commanded the defendant in the original proceedings as well as the bank to appear before the justice at an impossible time. Yet, nevertheless, it is contended by the plaintiffs in error that the judgment entered was valid, because both the defendant and the garnishee failed to appear and take some steps to prevent a judgment being entered. In other words, that notwithstanding they were commanded to appear upon a day long since past, still they were obliged to attend at some date subsequent to service and move the court to quash the summons. With this contention we cannot agree, and we do not think the authorities support it.

It is provided by section 1936, General Laws, 1883, that the justice in his summons shall specify a certain place, day and hour for the trial, not less than five nor more than fifteen days from the date of such summons.

By section 1940, it is provided that if the defendant, being served with process, shall not appear at the hour appointed for his appearance in such process, or in one hour thereafter, then the justice shall proceed to hear and determine the cause.

Section 1558 provides that after a conditional judgment has been entered the justice may issue a *scire facias* commanding the garnishee to appear on the return day of the writ and show why the conditional judgment should not be made final and conclusive.

We are clearly of the opinion that the provision of the statute requiring the summons of the justice to specify the place, day and hour, in the process when the party should

appear before him is mandatory, and should have been strictly followed. That the failure of the parties to appear on the 1st of August, or at a time subsequent to the 27th of July, confers no jurisdiction upon the justice to proceed to judgment. To say that the defendant and garnishee well knew that the time specified in the summons was a clerical error is to impose upon him the burden of determining the place, the day and the hour when he should appear. It puts upon him a duty which by the statute is imposed upon the justice issuing the process. He must determine whether the process was issued in June and returnable in July, or whether issued in July and returnable in August. We think the condition of things places it more within the ability of the justice to observe the errors into which he had fallen, than with that of the parties upon whom process was served.

The rule as we find it laid down in the books is, where the statute provides that the place, day and hour shall be specified, it must be followed strictly; and that service for an insufficient period is as inoperative to confer jurisdiction of the person, as service in some other mode than that required by the statute, and that failure to conform to the provisions of the statute is in violation of it. It follows therefore that a judgment is utterly void when the jurisdiction of the person is based upon such a process. *Johnson v. Baker*, 38 Ill. 98.

A judgment rendered by a justice of the peace against the defendant in an action four days before the return day of the summons is void. *Briggs v. Tye*, 16 Kans. 285.

Where a justice of the peace calls an action, on the return day of the summons, at a different place from that named in the summons (the defendant not appearing and waiving the objection) he loses jurisdiction. *Newcomb v. Town of Trempealeau*, 24 Wis. 459.

The day and hour fixed in the summons for its return is the period when the justice takes jurisdiction of the action, and not the time when he issues the summons.

If a justice proceed without having acquired jurisdiction over the parties in the form and in the manner required by

law, any judgment which he may render will be absolutely void. *Sagendorph v. Shult*, 41 Barb. 102; *Johnson et al. v. Baker, supra*.

It is insisted that notwithstanding the judgment may have been void, nevertheless scire facias was issued and the bank was cited to appear to show cause why the conditional judgment should not be made final, and that this of itself is sufficient to preclude the bank. With this contention we do not agree. If the conditional judgment was void, there was nothing upon which the scire facias could rest. No scire facias could issue save and except by authority of the statute, and the provision of the statute is that in case the garnishee being duly served with process as provided by the act shall fail to appear at the time and place in the process fixed for his appearance, default may be taken and conditional judgment rendered against such garnishee; thereupon scire facias may issue.

A careful reading of the statute leads us unmistakably to the conclusion that the conditional judgment is based upon the failure of the garnishee to appear at the time and place fixed by the process. If the process be insufficient in its failure to fix the time and place, then no conditional judgment can be rendered, and consequently the condition precedent to the issuance of scire facias does not exist, and the defendant was under no obligation to appear and defend.

This brings us to the last and only proposition remaining, and that is the right of the garnishee to the injunction granted by the court restraining the defendants from collecting the judgment by execution.

The case of *Edler v. Hasche and wife*, 67 Wis. 653, is one in point, wherein the question of the cancellation of a mortgage was involved. Cole, C. J., said: We are clearly of the opinion that the plaintiff is entitled to have the satisfaction of the mortgage in question canceled of record. It was wrongfully placed upon the record in the first instance * * *. It is claimed that they were delivered up in pursuance of an order of the justice in certain garnishee proceedings, but

those garnishee proceedings so far as the plaintiff was concerned were void and furnish no legal justification for his delivering over the satisfaction note and mortgage in violation of his instructions. A party claiming protection under such proceedings must show that they are regular and valid.

In the case of *Hebel v. The Amazon Ins. Co.*, 33 Mich. 400, it was held that it is essential in order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, that there be service of process or its equivalent, and he will not be bound by an independent and spontaneous submission of his rights by his debtor. Service of process from justice's court cannot, under the statute, be made beyond the county, and an acceptance of service which shows that it was made outside of the county thereby shows that it was made where the process had no legal force. All exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by the statute.

In *Padden v. Moore*, 58 Iowa, 703, this doctrine is laid down: A party cannot be required to appear as garnishee at any other time any more than a party to an action can be required to appear in obedience to an original notice at any other time than that fixed by law.

The authority to institute and prosecute garnishee proceedings is entirely statutory, and unless the requirements of the statutes are complied with the proceedings cannot be sustained: *McDonald v. Vinette*, 58 Wis. 619.

In the case last cited the court said: "The statute gives no authority whatever to issue a summons returnable on any day other than the return day of the execution. The garnishee defendant cannot be required by the summons to appear and answer touching his liability, on any other day. A departure from the statutory requirement of a single day is as fatal to the proceeding as one of a month or three months. The principle is the same in either case. The municipal judge could only take jurisdiction of the garnishee defendant

upon a summons issued and made returnable as the statute requires and duly served."

The object of the original process in this case was to advise the defendant and garnishee that an action or proceeding had been commenced against them, and warn them that they must appear within the time and at a place named, and make such defense as they or either of them had, and in default of so doing a judgment against them would be applied for. The summons did not do this. It advised both parties to appear at an impossible time. It was as fatal to the process as though the day had been left blank. And we think it was as much the duty of the plaintiff or his attorneys to inspect the record and to insist upon an observance of the statute by the justice, as it was of the defendant and the garnishee to advise them of the defective summons that had been issued. The summons was defective. It did not comply with the statute, and the judgment thereupon rendered both against the defendant and the garnishee was void for want of jurisdiction of the persons. The scire facias was issued in violation of the statute, and the bank was under no obligation to pay attention to it. The action of the court in granting the injunction restraining the enforcement of the judgment was proper, and the judgment must therefore be affirmed.

Affirmed.

ZOOK, APPELLANT, v. ODLE ET AL., APPELLEES.

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1. PAYMENT.

The delivery of a note of a third person to meet an antecedent indebtedness is not payment, nor does it furnish *prima facie* evidence thereof.

2. SAME—BURDEN OF PROOF.

If the debtor contends that the delivery of the note of a third person amounted to a payment, he must establish the fact by a preponderance of testimony.

3. PRACTICE.

When evidence was admitted without objection, questions as to its competency will not be considered on review.

Appeal from the District Court of El Paso County.

Mr. W. W. ANDERSON and Mr. DANIEL PRESCOTT, for appellant.

Mr. J. L. WILLIAMS, for appellees.

BISSELL, J., delivered the opinion of the court.

If this judgment could in any manner have been successfully assailed, the right was not preserved to the appellant by the record which she presents to this court. Some time in the year 1888 or 1889 the appellant, Mrs. Zook, was indebted to the appellees in the sum of about \$2,000, evidenced by her promissory note, which was secured upon certain property in the vicinity of Colorado Springs. In 1889, the note had not matured, but considerable interest had accrued which Mrs. Zook was bound to pay. To liquidate this portion of her debt, she offered, through her husband, who acted in her behalf, to the holders and owners of the paper a note which had been given by one Mrs. Hatch for \$200 to the order of Zook, Riddock & Company. At the time that this note was turned over to the holders of Mrs. Zook's paper, they delivered to her a writing which in terms stated the receipt of the note "in payment of interest due on loan on the Herman Hotel property." Subsequently Mrs. Zook paid the principal of the note, and all the interest save this \$200, and insisted that her entire obligation was discharged. It appeared that the Hatch note was not paid at its maturity, and that no steps had been taken to enforce its collection other than the sending of notices to the maker of the nonpayment. The holders of the security thereupon commenced an advertisement to sell the property covered by the trust deed to collect the sum represented by the Hatch note. The appellant, Mrs. Zook,

then brought this suit, setting up these facts in her complaint, alleging the liquidation of the entire indebtedness, and praying a perpetual injunction to restrain the appellees from selling her property. After hearing, the bill was dismissed and the appellant assigns error as to the judgment.

During the progress of the trial considerable testimony was introduced pro and con on the only question at issue, and that is as to whether the Hatch note was received by the appellees in payment of the then accrued interest, or whether it was taken as collateral security for the unpaid money, whereby Mrs. Zook would remain liable in case of the non-payment of the Hatch paper.

On this issue the court found with the defendants and evidently concluded that the note was not taken in payment, and that Mrs. Zook was still obligated for the unpaid interest. There are many reasons why this judgment cannot be disturbed. It is the settled law of this state that the delivery of a note of a third person to meet an antecedent indebtedness is not payment, nor does it furnish prima facie evidence that the note has been paid. The Supreme Court holds that, even though the creditor executes a receipt in full, it is only to be construed as payment in case the paper which is delivered shall be liquidated at its maturity. If the debtor contends that what was done amounted to a payment, he must establish it by a preponderance of testimony to the satisfaction of the court or jury which tries the case. *First National Bank of Pueblo v. Newton*, 10 Colo. 161.

On this issue the finding was against the appellant. It must be taken as conclusive of the case so far as this court is concerned, under the well settled rule governing appellate proceedings, since the finding was apparently well sustained by the testimony, and lacked none of the elements essential to satisfactory proof. The appellant contends, and on that point cites some very reputable authorities, that wherever the receipt contains any of the expressions and elements of a contract, it is not open to construction or examination, but must be taken in its literal terms, and to that extent is con-

clusive as to the rights of the parties. Whatever the law may be on that subject, as to which an expression of opinion is entirely unnecessary, no such proposition is open to the consideration of this court. The case was tried and the evidence introduced without objection, nor was the question saved in any such way as to give this court the right to determine it.

On the only propositions presented by the record, the judgment accords with the law and with the proof, and it is accordingly affirmed.

Affirmed.

JAIN, APPELLANT, v. GIFFIN, APPELLEE.

1. PLEADING—FRAUD.

Fraud must be pleaded to warrant the introduction of evidence concerning it. General allegations of fraud are insufficient.

2. GUARANTY—CONSIDERATION.

A guaranty executed subsequent to the original undertaking must rest upon a new and adequate consideration, in order to bind the guarantor.

3. SAME.

Where the guarantor of the note in controversy was an original promisor and bound upon another note, which the payee refused to surrender without his guaranty of the note given in renewal thereof, the guaranty must be held as having been executed concurrently with the original undertaking and as a promise requiring no new consideration.

Appeal from the District Court of Boulder County.

Mr. R. H. WHITELEY, for appellant.

Mr. J. M. O'NIELL, for appellee.

BISSELL, J., delivered the opinion of the court.

Early in 1886, W. S. Case and Miles Jain jointly executed to the order of S. B. Austin a promissory note for \$650, pay-

able at a date named and bearing a fixed rate of interest. It would appear from the record that Case was the borrower, and Giffin, the appellee, was the loaner of the money, Austin acting as the broker to procure it, and to accomplish the negotiation of the paper. Giffin declined to loan the money except upon the guaranty of Jain's name, who was supposed to be financially good. Some chattel security seems to have been given, but with this we have no concern. After the paper matured, Case, who was apparently the principal debtor, failed to pay it, and the original broker Austin received from him another note in August, 1886, for \$808.50, running for a like period, and for the same rate of interest, and secured in the same manner. This note bore date on the 6th of August. When it was presented at Giffin's office with a request for an extension, he declined to receive it or surrender the original paper, stating that he relied on the financial security afforded by Jain's name. Thereupon, and on the 18th of August, the appellant Jain indorsed on the back of the note "For value received, I hereby guarantee \$650.00 of the within note, and I hereby agree to pay \$650.00 as aforesaid in case said Case fails to pay the same, together with interest thereon according to the tenor of this note," and signed it. The note not having been paid at maturity this suit was brought on the guaranty. Giffin recovered judgment, from which Jain prosecutes this appeal.

There is really but one question in the record deserving much attention. In his answer Jain alleged that he was induced to sign the guaranty by the misrepresentations of the persons concerned in the transaction. He offered evidence touching this defence which the court excluded and properly declined to hear. The trouble was, Jain failed to so allege fraud as to entitle him to introduce any evidence on the subject. The whole allegation respecting the fraud was in a single sentence. Substantially it was that, misrepresenting the facts to him and intending to defraud him, Austin stated that his signature was desired by his brother-in-law Case. The well settled rule that fraud must be pleaded to warrant

the introduction of evidence concerning it is too deeply rooted in all systems of jurisprudence to need either elucidation or anything more than a cursory statement of the rule itself. The defendant's plea in no manner came within the requirements of the most lax decisions upon this question. Having failed to allege the fraud which he asserted, he should not have been permitted, as he was not, to introduce testimony on the subject.

There are a number of collateral questions presented in the briefs of counsel which hardly arise on the record, but which present but little difficulty under the present circumstances. It is doubtless true that a guaranty executed subsequent to the original undertaking must rest on a new and adequate consideration in order to bind the guarantor, because his promise is a collateral one, whereby he undertakes to answer for the debt or default of another. It is equally true under some circumstances the principal debtor must be proceeded against before the guarantor can be compelled to pay. The present case however comes within the scope of none of these principles. Jain most certainly was an original promisor on the first note and bond for the entire sum. When he executed the guaranty upon the back of the present instrument, that note was still an outstanding obligation which the holder Giffin declined to surrender until Jain signed and became bound on the renewal note. When he signed it, and not till then, was the note accepted and the original note surrendered. Under these circumstances the guaranty must be held as having been executed concurrently with the original undertaking, and therefore a promise requiring no new consideration to support it. So too when the guaranty is examined, it will be found that on its face it is expressed to be for value received, and is the guaranty of a note due at a specified and fixed time, and is an undertaking to pay, and not that the original promise shall be collectible.

Under those circumstances there is a sufficient recital of consideration, and it warrants a suit against the guarantor without any proceeding against the principal primarily. Brandt

on Suretyship & Guaranty, Chap. 3, § 86; Campbell v. Knapp, 15 Pa. St. 27; Parkhurst v. Vail, 73 Ill. 343; Bickford v. Gibbs et al., 8 Cush. 154.

No other questions have been urged by counsel for the appellant, and since the court below decided correctly as to all these propositions the judgment must be affirmed.

Affirmed.

MILLER, APPELLANT, v. STAPLES, APPELLEE.

SERVANT'S LIABILITY.

A servant is liable in damages to a third person for the negligent performance of his master's business.

Appeal from the County Court of Larimer County.

Messrs. ROBINSON & LOVE, for appellant.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

If the servant or agent can be held liable for the misfeasance resulting from the improper doing of an act otherwise lawful while engaged in the service of the master, or the transaction of the business of his principal, this judgment must stand.

In June, 1889, one Mellon was engaged in the business of raising and handling horses in North Park, Colorado. At that time the appellee, Staples, placed four mares with him for breaking and service. It appears that the mares were aged animals, requiring some trouble and care to fit them to use. In the following August, Edward Miller, the appellant, was working on Mellon's ranch as a hand, for current wages. On the 17th of the month, while the stock was running with

other animals, Miller was directed by his employer to separate two of Staples' mares from the balance of the herd, and to put them in another part of the corral for the purposes of handling and breaking. There is a little uncertainty whether Miller was at that time directed to rope the mares or simply ordered to separate them. In any event, after he had cut them out of the herd and driven them into the corral, he proceeded to rope them that they might proceed with the breaking. Who threw the rope to catch the horses is not clearly shown, but this is immaterial. The rope was thrown over the head of one of the mares, and Miller undoubtedly had hold of it, seeking to handle and manage her. The animal was thrown to the ground, and, according to Mellon's testimony, within two or three minutes from the time the horse was on the ground, he was there attempting to put a hackamore on her head. When this was done, and they attempted to let the mare up, it was discovered that she was dead. According to the testimony it not infrequently happens that in roping an aged horse, the horse is killed by breaking its neck; but it would seem that a fatality does not otherwise occur in that method of catching horses, except by the inexcusable negligence and carelessness of the roper. It will be assumed from the record that the mare was killed by choking, and that this resulted from Miller's negligence. This would subject both Mellon and Miller, or one of them, to legal responsibility for the loss of the stock.

This statement clears the way for an easy settlement of the query propounded at the commencement of this opinion.

The frequent attempts of agents to escape responsibility for their negligent acts by shielding themselves behind the principal whose business they may be transacting when the injury is done, has led to many discussions as to the proper limits of the defences based on the employment. The rule is pretty well settled that while both principal and agent are liable for the injuries which may come to a third person from the agent's misfeasance or malfeasance, the injured party may elect to sue one or the other, or both, at his pleasure.

Doubtless the primary responsibility rests on the principal as to the agent's misfeasance, and he should be called upon to answer for the damages resulting from the negligent performance of his agent, yet the servant or agent may likewise be sued and he cannot escape by asserting that what he did was done while working for his master. *Harriman v. Stowe*, 57 Mo. 93; *Bell v. Josselyn*, 3 Gray, 309; *Brown Paper Co. v. Dean*, 123 Mass. 267; *Horner v. Lawrence*, 37 N. J. L. 46; *Phelps v. Wait*, 30 N. Y. 78; *Feltus v. Swan*, 12 Miss. 415; *Powell v. Deveney*, 3 Cush. 300.

Since it is established by these authorities that the agent is liable for the damages resulting from his negligent doing of the acts proven against him, it is manifest that the judgment entered against him was right and that it must be affirmed.

Affirmed.

SAGERS, PLAINTIFF IN ERROR, v. NUCKOLLS ET AL., DEFENDANTS IN ERROR.

1. MASTER AND SERVANT.

The test of the liability of the master for the acts of his servant in all cases is whether the act was done by his express authority or fairly implied from the nature of the employment and the duties incident to it.

2. SAME.

To make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment. If he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more liable than a stranger. It is also imperative that the employment be in the prosecution of a lawful business.

3. SAME.

The relation of master and servant cannot exist in a conspiracy or confederation of individuals to commit crime,—all are principals and are jointly and severally responsible for the consequences of the wrong perpetrated.

4. AUTHORITY, WHEN NOT IMPLIED.

A servant can have no implied authority to do that which it could not be lawful under any circumstances for either him or his employer to do.

5. SAME.

It is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business in order that an authority to do it may be implied.

Error to the District Court of Garfield County.

This was an action at law brought under the provisions of chap. 27, Genl. Stats., by plaintiff in error, widow and heir at law, to recover damages for the death of her husband, George W. Sagers, alleged to have been shot and killed by William E. Nuckolls. The following are the important allegations contained in the amended complaint:

“That on said last mentioned date, and from the month of October, A. D. 1883, hitherto the above named defendants, Reef & Nuckolls, as plaintiff is informed and believes, were and now are copartners in business, and doing business in Garfield county, in buying and selling, pasturing, herding, raising and handling, slaughtering and dealing in cattle, beef and stock. That in their cattle and stock business, said defendants, Emmet and G. Harvey Nuckolls took possession and used and claimed a large tract of the unsurveyed government lands, situated upon the east branch of Mann creek, in said Garfield county, state of Colorado, and which said tract said defendants occupied and claimed as their headquarters, or home ranch, for their said cattle and stock business, and occupied and improved the same by and through their agents and employees and the said G. Harvey Nuckolls, and pretended to own the same and have the right to sell and dispose of the same; but plaintiff alleges that said defendants so claimed and occupied the said public lands, without a legal right, under or by virtue of the laws of the United States, or of the states of Colorado so to do.

“Second.—That on the said 7th day of September, and for a long time prior thereto, to wit: From the month of January,

A. D. 1888, William E. Nuckolls was serving said defendants as an employee, agent or servant, at and upon the said headquarters, aforesaid; that he worked and labored for the said defendants thereon in farming and herding the stock of said defendants, and among the duties and requirements of said William E. Nuckolls, as such servant and employee, and for which he was employed by said defendants, it was his duty by general direction and instruction of said defendants to aid and assist said defendants in holding the possession of their said ranch claim, and guns and pistols were provided thereat by said defendants for that purpose, for the use of said William E. Nuckolls and his co-servants at all times during said occupation and claim of said ranch claim, and especially on, to wit, the 7th day of September, 1888, bore (and since said 7th day of September, and now said co-servants are bearing) said arms for said purpose, to wit, the purpose of defending with force and arms, if necessary, the possession of said claim and property, for said defendants, Emmet and G. Harvey Nuckolls, against all comers and claimants, and particularly against the said George W. Sagers, the the lawful claimant of a portion thereof.

“Third.—That said defendants, by and through their said servant, William E. Nuckolls aforesaid, who was then and there engaged and employed, and armed and directed by said defendants as their servant as aforesaid, to hold and maintain them in their possession of said land, and, while the said George W. Sagers was in the act of peaceably and lawfully proceeding through the same, the said William E. Nuckolls pretended and claimed that said George W. Sagers was committing a trespass upon and interfering with the alleged and pretended rights of said defendants, did, on, to wit, the 7th day of September, A. D. 1888, on the said pretended land claim of said defendants aforesaid, negligently, unlawfully and wrongfully cause the death of him, the said George W. Sagers, being then and there in the peace of the people, by the act of the said William E. Nuckolls, in that said William E. Nuckolls did then and there assault and shoot him, the said

George W. Sagers, with a pistol, commonly called a revolver, a deadly weapon of the size usually carried as a concealed weapon, giving to said George W. Sagers a mortal wound, of which he then and there died, whereby plaintiff was deprived of the care, maintenance, support and protection of her said husband, George W. Sagers, deceased, to her great damage, to wit, in the sum of five thousand (\$5,000) dollars, under the statute in such case made and provided."

To this complaint demurrers were filed by the defendants individually, the only ground of demurrer being that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were sustained by the court. The plaintiff elected to stand by her complaint; a writ of error was sued out to the supreme court, and the case transferred by that court to this.

Messrs. BENNETT & BENNETT and Mr. J. E. HAVENS, for plaintiff in error.

Mr. J. W. TAYLOR, for defendant in error.

REED, J., after stating the case, delivered the opinion of the court.

The only question presented is the correctness of the judgment of the court in sustaining the demurrers. In other words, whether the employer is liable in damages under the statute for the killing of a person by a servant or employee under the circumstances as stated in the complaint. The provision of the statute upon which the action is based is sec. 2, chap. 27, Genl. Stat., entitled "Damages."—"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death

had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured." An examination of the section of the statute under consideration will show that it provides generally for compensation, "whenever the death of a person shall be caused by a wrongful act, neglect or default of another." The circumstances must be such as to entitle the injured party to damages if death had not ensued, but affording no guide as to the circumstances under which the principal or master shall be held liable, hence, the liability must be determined by the rules and principles of the common law.

In 1880, 43 & 44 Vict., chap. 42, an act entitled "The Employers Liability Act" was passed by the English parliament, which, while more elaborate, explicit and detailed than our statute, legally amounts to the same thing, and in fixing the liability the courts in every instance are compelled to have recourse to the common law adjudications.

The solution of the question presented is one of great difficulty. While the general principles and rules of law controlling in such cases are so clearly stated as to render them almost axiomatic, and each rule is stated many times in different language, the principle and result being the same, the trouble has been, and still is, the application of the rules. The conflicting decisions in applying the principles are so numerous as to produce confusion as soon as an examination is undertaken.

The liability of the master for the wrongful acts of a servant is predicated upon the maxim "*qui facit per alium facit per se*," and is in direct conflict with the broad and universal doctrine of personal liability for wrongs perpetrated; consequently, in applying it great care is taken in restricting it clearly within legal limits. The great multiplication of corporations, where all acts are necessarily performed by agents or servants, has latterly led to the extension and widening of the application in many cases, in order to afford the requisite protection, and from such necessity courts have gradually

extended the principle to cover cases not formerly supposed to be embraced.

The complaint in the case is very carefully drawn. In order to apply the law an analysis of the complaint is necessary.

First.—It is alleged that Reef & Nuckolls, a firm composed of J. S. Reef, Emmet Nuckolls and G. Harvey Nuckolls, “were buying and selling, pasturing, herding, raising and handling, slaughtering and dealing in cattle, beef and stock.” In the second paragraph it is alleged that “Wm. E. Nuckolls was serving *said defendants* as an employee, agent or servant at and upon the said headquarters, aforesaid; that he worked and labored for *said defendants* thereon in farming and herding the stock of the said defendants.” * * *

Second. — Taking up the other branch—it is alleged in the first paragraph, “that in their cattle and stock business, Emmet and C. Harvey Nuckolls took possession of and claimed a large tract of the unsurveyed government lands * * *, which said tract said defendants occupied and claimed as their headquarters, or home ranch for their said cattle and stock business, and occupied and improved the same by and through their agents and employees and the said G. Harvey Nuckolls, and pretended to own the same and have the right to sell and dispose of the same; but plaintiff alleges that said defendants so claimed and occupied the said public lands, without a legal right, under or by virtue of the laws of the United States, or of the state of Colorado.” In the third paragraph it is alleged that Wm. E. Nuckolls, who was engaged, employed and armed by defendants “*to hold and maintain them in their possession of said land,*” shot and killed Sagers for a pretended trespass upon the land. Though not fully and affirmatively stated, it is fairly inferable, that the trouble and controversy resulting in the killing grew out of the possession of the land, for it is said, in speaking of the land, “George W. Sagers, the then lawful claimant of a portion thereof.”

The sufficiency of the complaint, in the first instance, must be tested by the following general principle, controlling in

all cases of this character:—"Was the act done under such circumstances that under the employment the master can be said to have *authorized* the act? For if he did not, either *in fact* or *in law*, he cannot be made chargeable for its consequences; because not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim does not apply." Wood's Mast. & Serv't, § 279. The test of the liability of the master in all cases is whether the act was done by his express authority or fairly implied from the nature of the employment and the duties incident to it.

See *McManus v. Crickett*, 1 East, 106, which is a leading case on the question under discussion. Among the earliest reported cases is that of *Middleton v. Fowler*, Salk. 282. Holt, C. J. said, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him."

The rule is clearly laid down in 1 Black. Com., 429, 431. It is said: "The master is answerable for the act of his servant, if done by his command either expressly given or implied;" again, "if a servant by his negligence, does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service, otherwise, the servant shall answer for his own misbehavior."

In *Foster v. Essex Bank*, 17 Mass. 479, the court said:—"It may be inferred from the cases as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment, and that if he steps out of it to do wrong, either fraudulently or feloniously, towards another, the master is no more liable than any stranger." See *Mech. Bank v. Bank of Columbia*, 5 Wheat. 326; *Ellis v. Turner*, 8 Term Rep. 533.

In Cooley on Torts, 625, it is said, "That which the superior has put the inferior in motion to do, must be regarded as done by the superior himself;" and at page 627, "but the

liability of the master for intentional acts which constitute legal wrongs, can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do." See also *Ill. Cent. R. R. Co. v. Downey*, 18 Ill. 258; *Evansville R. R. Co. v. Baum*, 26 Ind. 70; *Crocker v. New Lond. etc. Co.*, 24 Conn. 249; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480, s. c., 2 N. Y. 479.

The next, and one of the most important distinctions and considerations is, that to render the master liable the act must be done in the prosecution of the service of the master. Any deviation so as to render it the act of the servant, the responsibility of the master ceases, and the fact of the relation of master and servant has no bearing.

It is said in *Pickens v. Dricker*, 21 Ohio St. 212:—"The person for whose acts he is sought to be charged must *at the time* when the act complained of was done, not only have been acting for him, but must also have been authorized by him, either expressly or impliedly, to do the act." It follows that there must be an employment—the relation of master and servant must exist; that the wrong of the servant was incidental to or in the line of his employment and within the authority given. It is also imperative that the employment be in the prosecution of a lawful business. In a conspiracy or confederation of individuals to do criminal acts or acts in violation of the law, there is, and can be no such relation as master and servant—all are principals—they are all jointly and severally responsible for the legal consequences of the wrong perpetrated. In cases where the master is attempted to be held liable for the acts of the servant, it is a well settled rule of law that, where the servant acts in obedience to an express order given by the master, the master is liable for all the consequences of the servant's acts, either civilly or

criminally. Wood Mast. & Servt. § 278; *Rex v. Bleasdale*, 2 Car. & Kir. 766; *Rex v. Michael*, 9 Car. & P. 357; *Rex v. Palmer*, 1 New Rep. 97.

The troublesome question in all the cases is not of *express* but *implied* authority, whether the act done was so far incidental to the service for which he was employed that it may be supposed to have been done “*in the line of his duty and in the furtherance of the master's business.*”

A carefully considered case involving this question is that of *Phelon v. Stiles*, 43 Conn. 426. See also *Rounds v. Del., etc., R. R. Co.*, 64 N. Y. 129.

A well settled principle of law lying apparently at the very foundation of this action is, “That a servant can have no implied authority to do that which it could not be lawful under any circumstances for either him or his employer to do.” Shear. & Red. on Neg., § 61; *Lyons v. Martin*, 8 Adol. & El. 512; *Poulton v. London, etc., Ry. Co.*, L. Rep. 2 Q. B. 534; *Steamboat Co. v. Railway Co.*, 24 Conn. 40; *Church v. Mansfield*, 20 Conn. 284; 2 Hil. on Torts, chap. 40, § 6 a.

In recent English decisions of cases decided since statutes 43 & 44 Vict., referred to above, an important test of the liability of the principal seems to be whether he had the authority to do the act performed by the servant, and if he had not there could be no authority implied from him to the servant, consequently the principal would not be liable for the act of the servant on the ground of an implied authority; and to render a principal liable for the acts of the servant, in a matter that could not lawfully be done by himself, there can be no implied authority—there must be an express authority.

In *Poulton v. London & S. W. Ry. Co.*, L. R. 2 Q. B. 534 *supra*, Blackburn, J., said: “It is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business in order that an authority to do it may be implied.” See *Edwards v. London & N. W. Ry. Co.*, L. R. 5 C. P. 445; *Lucas v. Mason*, L. R. 10 Exc. Cases, 251.

See further on points stated above: *Rourke v. White Moss Coll. Co.*, L. R. 1 C. P. Div. 556; *s. o.*, L. R. 2 C. P. Div.

205; *Rayner v. Mitchell*, L. R. 2 C. P. Div. 357; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Allen v. London & S. W. Ry. Co.*, L. R. 6 Q. B. 65; *Cobb v. Columbia, etc. C. R. Co.*, Sup. Court of Georgia, Sept., 1892; *Goddard v. Railway Co.*, 57 Me. 202.

The following conclusions are inevitable from the allegations of the complaint:

First. That the business of Reef & Nuckolls as a firm, and of Reef as an individual, was legitimate and lawful.

Second. That William E. Nuckolls as the servant of Reef & Nuckolls in farming and handling stock was employed for legal and legitimate service.

Third. That the land attempted to be held was claimed by Emmet and G. Harvey Nuckolls, and that neither the firm of Reef & Nuckolls nor Reef individually had any connection with it whatever.

Fourth. That the killing grew out of a controversy over the possession of land claimed only by Emmet and G. Harvey Nuckolls, and was in no way connected with the employment of William E. Nuckolls by the firm of Reef & Nuckolls, nor in any way incidental to or growing out of it. This disposes of the case as far as the firm of Reef & Nuckolls, and Reef individually, are concerned. As to them no cause of action, whatever, is shown.

Taking up the other branch of the case, it is alleged that Emmet and G. Harvey Nuckolls took illegal possession of a large tract of unsurveyed government land, a part of which was claimed by the deceased; that they and their servants were armed, and were, by force and arms, maintaining the illegal possession of the land, and that William E., in attempting to maintain such possession for Emmet and G. Harvey Nuckolls, shot and killed Sagers. No hiring of William E. by Emmet and G. Harvey Nuckolls is alleged; no relation of master and servant alleged as existing in the attempted holding of the land. The employment alleged, as before stated, was by Reef and Nuckolls in a lawful business. If any liability of any of the parties can be predicated upon the

supposed relation of master and servant, it must be that of Emmet and G. Harvey Nuckolls, in whose interest the alleged wrongs were perpetrated, in a matter entirely distinct and separate and disconnected with the business of the firm.

Applying the principles of law to the facts and circumstances as stated, it is obvious that Emmet and G. Harvey Nuckolls cannot be held liable for the act of the killing. First, it is indispensable that the relation of master and servant existed in the line of employment in which the trouble arose and the wrong was perpetrated. No employment by the parties for any such business or purpose is alleged. It is only alleged as being incidental to his employment by Reef & Nuckolls in farming and the handling of cattle. Second, as above shown, to render the employer liable the employment must be lawful and the business lawful. The wrong and fraud upon the government and the public by taking illegal possession of a large tract of the public domain, preventing its occupation, settlement and sale by and to those who had legal right to occupy under the laws of congress, and maintaining such possession by force and violence, resulting in the taking of life, cannot be regarded as the prosecution of a lawful business and one in which the relation of master and servant could have existence. Under such circumstances all are principals, confederates, in the prosecution of a criminal enterprise, and all jointly, or each individually, may be held criminally responsible for any wrong perpetrated.

It follows, that guarding and protecting the illegal possession of the land claimed by the individuals as alleged was not an incident of the alleged employment, but a criminal and wrongful act as a confederate or a volunteer, in which the question of master and servant could have no place. It matters not, as stated in the complaint, that it was a duty required by others by virtue of his employment that he was armed by his employers, and even had express orders to eject or kill any person invading the possession.

The remedy for such criminal acts cannot be found in a

civil suit for damages, but must be reached by another branch of the law.

I have carefully examined all the authorities cited, supposed to establish the liability of the supposed principals, but the case under consideration is clearly distinguishable. In each and every of those cases it will be seen that the relation of master and servant existed; that the employment was in legal and legitimate business, and that the wrong complained of grew out of the negligence or wanton and excessive exercise of the authority supposed to have been expressly or impliedly conferred, as pertaining to the lawful employment, or as incidental to it. In every instance where the servant stepped out of the line of his employment for his own purposes or in performing acts for another, it has been held that the liability was personal and the doctrine of "*respondeat superior*" had no application.

The judgment of the district court in sustaining the demurrer must be affirmed.

Affirmed.

LAMB, APPELLANT, v. THE PEOPLE EX REL, JEFFERDS,
APPELLEES.

1. EXECUTIVE—POWER OF APPOINTMENT.

By the amendatory act of April 1, 1891, the power to appoint the state veterinary surgeon is vested in the governor, subject to the approval of the senate.

2. STATE VETERINARY SURGEON.

The state veterinary surgeon is a state officer, and the power to remove him is by the constitution vested in the governor.

3. CONSTITUTIONAL LAW.

When powers are specially conferred by the constitution upon the governor, the legislature cannot authorize them to be performed by any other officer or authority; and from those duties which the constitution requires of him, he cannot be excused by law.

4. STATE VETERINARY SANITARY BOARD.

The state veterinary sanitary board has no authority to pass upon the

qualifications of the state veterinary surgeon, and no power to remove him from office.

Appeal from the District Court of Pitkin County.

THIS was a proceeding in the nature of a writ of quo warranto to test the title to the office of state veterinary surgeon. On the 1st day of April, A. D. 1891, Hon. John L. Routt, governor, appointed the relator, Jefferds, to the office. The appointment was confirmed by the senate on the 9th of April. He qualified by filing the required bond and taking the oath of office, and entered upon the duties. On June 22d of the same year, the State Veterinary Sanitary Board attempted to remove him and passed the following resolution:

“Whereas, the present state veterinarian has proven utterly incompetent and inefficient to fill said position, be it resolved; that, under the power vested in us by law, he is hereby removed, and the office declared vacant, and the governor be requested to appoint without delay a competent person to fill the office of state veterinarian, and H. H. Metcalf is appointed secy. *pro tem.*, until such appointment.

“J. L. BUSH, Pres't,

“H. H. METCALF,

“C. E. STUBBS.”

Thereupon the governor appointed appellant to the position, who entered upon his duties and has since been in possession of the office. In answer to the relation the defendant set up the incompetency of relator, the supposed removal by the State Veterinary Sanitary Board, the appointment of appellee, etc. A demurrer was filed to the answer, sustained by the court; defendant declined to amend, and judgment in favor of appellee and ouster of appellant was entered, from which this appeal is prosecuted. Several errors are assigned, but all going to the same point, viz., that the court erred in sustaining the demurrer and adjudging the answer insufficient.

Mr. J. H. MAUPIN, attorney general, and Mr. H. B. BABB, for appellant.

Mr. CHARLES R. BELL and Mr. J. W. TAYLOR, for appellees.

REED, J., after stating the case, delivered the opinion of the court.

The relator was duly appointed, confirmed by the senate, qualified and legally in the possession of the office. The only question to be determined is as to the power of the State Veterinary Sanitary Board to make the attempted removal. The question of competency cannot be considered; competent or incompetent, he had a right to the office until deposed by competent authority; nor shall we consider whether such board was the proper tribunal to pass upon his qualifications and determine the question. It is said in the answer that the relator "admitted to said board his said inefficiency and incompetency." No evidence was taken, consequently there is no proof of such admission. If it was made, it should be particularly remembered and transmitted to posterity as the first instance where a state officer admitted his incompetency to discharge the duties of any office of which he was an incumbent.

The offices of State Veterinary Surgeon and State Veterinary Sanitary Board were both created by the act of March 23, 1885, entitled "An Act to prevent and suppress infectious and contagious disease among the domestic animals of this state, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation." By sec. 2 of such act, the governor is required to appoint to the office of state veterinary surgeon "the person elected by the state board of agriculture, as the professor of veterinary science, and holding the chair of veterinary science in the State Agricultural College." By sec. 3 it is provided that he shall hold his office two years unless he is sooner deposed from his office in the State Agricultural College. By sec. 5 it is provided that, in case of a vacancy by the removal of the incumbent from his position in the State Agricultural College, the

successor to such position in the college shall be appointed by the governor to fill the unexpired term of state veterinary surgeon. Sec. 6 provides for the creation of the State Veterinary Sanitary Board, which was to consist of the state veterinary surgeon and two other members, appointed by the governor and confirmed by the senate. The balance of the act defines their respective powers, duties, etc.

On March 3, 1887, an act was passed entitled "An Act to amend an act entitled An Act to prevent and suppress infectious and contagious diseases among the domestic animals of this state, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation," of which the 1st, 2d and 3d sections are as follows:—

"Sec. 1. That section 2 of An Act to amend an act entitled 'An Act to prevent and suppress infectious and contagious diseases among domestic animals of this state, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation,' be, and is hereby repealed, and the following enacted in lieu thereof:—Sec. 2.—The State Veterinary Sanitary Board shall appoint the state veterinary surgeon.

"Sec. 2. Section 3 of said act is hereby amended so as to read as follows: Sec. 3. The person so appointed shall hold his office for the term of two (2) years from the date of his appointment; *provided*, such person is not sooner deposed by the State Veterinary Sanitary Board.

"Sec. 3. Section 5 of said act is hereby repealed and the following enacted in lieu thereof: Sec. 5. The state veterinary surgeon shall be the secretary of the State Veterinary Sanitary Board."

Sec. 4. amends the 6th section of the act of 1885 in relation to the State Veterinary Sanitary Board, making it consist of three members to be appointed by the governor and confirmed by the senate; also contains new matter not necessary to be considered. Sections 19 and 20 are also amended.

It will be observed that in section 1 of the bill the author became slightly "tangled" in saying "that sec, 2 of an act to

amend an act entitled," etc. The mistake is in speaking of the original act as an amended act, which was evidently a clerical error. There had been but one act, which had not been previously amended. The title of the amending act is correct, the intention of the legislature apparent, and there being but one act to which the amendment could apply, there can be no question, and the error must be disregarded. No one could be misled by it, and its application and reference to the original act is conclusive of the legislative intention.

By this amendment the appointing power is vested in the State Veterinary Sanitary Board. The state veterinary surgeon is to be the secretary of the board. His term of office is to be two years, "*Provided, such person is not sooner deposed by the State Veterinary Sanitary Board.*" No direct power of removal is conferred upon the board. It is only by inference or implication that the supposed power of removal is conferred, and was probably deemed incidental to the power of appointment; and the officer being an appointee and servant of the board, that the power of removal by the same body was inherent. This might admit of question without power expressly conferred, but the evident intention of the legislature being, by the language used, to invest the board with the power to remove. It might and probably would prevail in a case where the appointment was made by that body.

By an act of April 1, 1891, the original act of 1885 was again amended in the same section (2). The appointing power is again given to the governor, but without any restriction as in the first act. The appointee is to hold his office for two years and there is no provision for his removal. In this amendatory section no reference whatever is made to the amendment of 1887, but it directly asserts it to be an amendment of sec. 2 of the act of March 23, 1885, and this is probably proper from the fact that by the act of 1887 the original section 2 was repealed, and the new section substituted, and it thus became incorporated into and a part of the original act. If this is not so, the question becomes unim-

portant, for by sec. 3 of the act of 1891 it is declared, "all acts and parts of acts in conflict with this act are hereby repealed" which would operate as a direct repeal of that section of the statute of 1887 conferring the appointing power upon the board.

The following is the constitutional provision in regard to the appointment and removal of officers: Art. 4, sec. 6.— "The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty or malfeasance in office." The office is not one established by the constitution, but was expressly created by law, and by the amendatory act of 1891 the appointing power was expressly conferred upon the governor. By that act the office of state veterinary surgeon was divorced and entirely separated from all connection with the state board; his duties remained as defined in the act of 1885.

The act of 1885, as amended by subsequent act of 1891, leaves the offices of state veterinary surgeon and the state veterinary sanitary board separate and distinct. Each are state officers with independent and well defined duties. Sec. 1 of the act of 1887 repealing sec. 2 of the act of 1885, and the latter clause conferring the power of appointment upon the sanitary board, and sec. 2 of such act amending sec. 3 of the act of 1885, must be construed together. The former makes the surgeon the appointee and servant of the board to be appointed, and, impliedly by the latter section, removable at its pleasure. No confirmation by the senate is required—the whole matter rests in the discretion of the board, whose servant he is made by the act, and the right to remove its own appointee and servant is properly regarded as incidental or inherent, and with the repeal of the appointing power the latter section must fall with the former upon which its sole vitality was predicated.

By the act of 1891 amending the act of 1885, the appoint-

ing power was vested in the governor, subject to approval by the senate, and the veterinary surgeon became as thoroughly a state officer as any other known to the law, and the power of removal was by the constitution vested in the governor. He held his office by the same tenure as the sanitary board, by the appointment of the governor and confirmation of the senate. It is not necessary to inquire whether, under the constitution, the power to remove an officer so appointed could, by the legislature, be delegated to any other individual or body. The power is very doubtful, but it is sufficient to say that it could not be delegated without direct and special legislation conferring the power of removal. The power could neither be implied nor inferred in this case. No such special designation of power was made or attempted, and when, by the act of 1891, he became a state officer, and occupied the same legal position as that occupied by those who attempted to remove him, they had no more power to effect such removal than to remove the state engineer, or if the surgeon had attempted to remove the sanitary board.

The constitution itself is conclusive upon the question. The power to remove is vested in the governor, and the power being designated is exclusive in the absence of positive legislative enactment. In the very nature of the administration of public affairs, the power of one appointee to remove another cannot be supposed to exist. Persons filling co-ordinate offices cannot remove each other. The conclusions here adopted are so self-evident from the provisions of the constitution and the examination of the statutes, that no authorities are necessary for their support, but a few may be cited.

In Cooley Const. Lim. 133 (6th ed.), the whole doctrine is briefly summed up as follows: "That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law."

In *Atty. Genl. v. Brown*, 1 Wis. 513, the court says:—
“Whatever power or duty is expressly given to, or imposed upon the executive department is altogether free from interference of the other branches of the government. Especially is this the case where the subject is committed to the *discretion* of the chief executive officer either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise.”

In *State v. Doherty*, 25 La. Ann. 119, it is said, “Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected.” See also *State v. Kennon*, 7 Ohio St. 546; *Lane v. Com.*, 103 Pa. St. 481; *Wilcox v. People*, 90 Ill. 186.

It follows from the premises that the State Veterinary Sanitary Board had no authority to pass upon the relator's qualifications, and no power of removal; that such authority and power were by the constitution vested only in the governor, consequently, that the relator was not deposed.

The judgment of the district court will be affirmed.

Affirmed.

McMEEL ET AL., APPELLANTS, v. O'CONNOR, APPELLEE.

VOID SALE—REDEMPTION.

One who was intended to be made trustee, but by mistake was not so made, takes no title under the deed of trust and is not invested with any powers as trustee. A sale by him is void, and does not preclude the trustor of his right to redeem.

Appeal from the District Court of Arapahoe County.

Mr. WILLIAM KNAPP, for appellants.

Messrs. SULLIVAN & MAY, for appellee.

REED, J., delivered the opinion of the court.

It appears by the pleadings of both parties that O'Connor (appellee) borrowed \$250, for which he gave his note payable to McMeel, and secured it by a trust deed upon two building lots which were conveyed in trust by mistake to McMeel, as trustee, to secure money alleged in the trust deed to be due and payable to John C. Keegan. The parties were reversed in the trust deed; the property was conveyed to the beneficiary, instead of the trustee. It was evidently the intention to convey to Keegan, as trustee, to secure McMeel, but the conveyance was to McMeel as trustee to secure Keegan; the note was also described in the trust deed as payable to Keegan.

The note having matured and being unpaid, Keegan, assuming to act as trustee, advertised and sold the property to McMeel as purchaser and executed a deed as trustee purporting to convey the property. Some time after O'Connor tendered the amount due upon the note, which McMeel refused, claiming to be owner of the property. This suit was brought to compel McMeel to take the amount due and, by proper conveyance, to clear up the title. The facts stated in the complaint are admitted in the answer, and a cross complaint was filed alleging that the conveyance was the result of a mutual mistake, and asking for a reformation of the deed of trust, and that McMeel be declared the owner of the property. A demurrer was filed to the answer and cross complaint and sustained by the court. Defendants elected to stand by their answer, and a decree was entered for the plaintiff, and an appeal from such decree.

The decree must be affirmed. No title whatever passed to Keegan by virtue of the conveyance by trust deed, nor was he invested with any powers as trustee, hence, in assuming the duties of trustee and attempting to advertise and sell, he was only a volunteer, and the proceedings and supposed deed made by him as trustee were void and of no effect. No title having passed, the right of O'Connor to pay off the in-

debtedness and receive a release of his property clear of the cloud cast upon it by the pretended sale and conveyance was unquestionable. If a reform was needed of the trust deed to make it conform to the intention of the parties, it should have been reformed before attempting to dispose of the property under it.

Affirmed.

DESSAUER ET AL., PLAINTIFFS IN ERROR, v. KOPPIN,
DEFENDANT IN ERROR.

1. JUDGMENT, FORM OF.

When an action is brought against copartners to collect a firm debt, it is error to render judgment against one of the partners as for an individual debt.

2. SAME.

The only judgment which can be entered in an action against a firm when all its members have not been served or have not appeared is one against the partners, to be enforced against partnership property and that of the member served.

Col. App.	
8	115
8	475
8	583
19c	209
3	115
6	145
6	376
8	115
15	97
15	849
15	401
8	115
28	479
3	115
20	512

Error to the District Court of Montrose County.

Messrs. GRAY & SELIG and Messrs. GOUDY & SHERMAN,
for plaintiffs in error.

No appearance for defendant in error.

BISSELL, J., delivered the opinion of the court.

This case is clearly controlled by the principles announced in *Exchange Bank v. Ford*, 7 Colo. 314, and *Craig v. Smith*, 10 Colo. 220. According to the record the plaintiff declared on a debt due from a firm and the proof established a co-partnership liability. Koppin was the publisher of a paper called "The Montrose Enterprise," and at various times had published in that journal advertisements and local notices at

the request of Dessauer & Disman, who were doing business as a firm in the town of Montrose. The complaint embraced other causes of action against the partners, but as in the account which Koppin sought to recover, if there was any indebtedness at all against them, it had been contracted by the partners and for the benefit of their joint enterprise. The suit was brought in July, 1891, and the court acquired jurisdiction by the service of the summons on Ben Disman, one of the copartners. There was no service on the other member of the firm, and although the answer appears to be that of the copartnership, there was evidently no appearance by Dessauer, since in the entry of judgment this lack of service is recited. Under these facts the court entered judgment that the plaintiff "have and recover of and from Ben Disman, one of the defendants, judgment in the sum of \$75.55," etc.

There is nowhere in the record any entry showing the rendition of judgment against the firm, or any other recovery by the plaintiff save what has already been cited.

Under these circumstances it is manifest the judgment cannot stand. In the facts disclosed by the record, and in the character of the judgment entered, there is no difference between this case and that of *Craig v. Smith*. Judgment was rendered against Disman, the partner served with process, as if for an individual debt. As is decided in the case last referred to, the only judgment which may be entered in a case of this description is one against the copartnership. The reasons given for that decision are entirely satisfactory. The plaintiff is entitled to enforce his claim against the copartnership property, and the partner who is served with process has clearly the right to insist that the firm assets shall be exhausted before the creditor shall resort to his individual property for the satisfaction of his claim.

Since the judgment entered was not in harmony with this well established rule, it must be judged erroneous, and the cause reversed and remanded for further proceedings in conformity with this opinion.

Reversed.

AYRES ET AL., APPELLANTS, v. THE PEOPLE, ETC.,
APPELLEES.

3	117
12	276

1. SURETIES ON RECOGNIZANCE—STATUTORY CONSTRUCTION.

Sureties on a recognizance, who desire to avail themselves of the provisions of sec. 969, Gen. Stats., in order to escape liability for the full amount of their bond, must pay the expenses incurred by the county in procuring the return of their principal from another state upon a requisition.

2. STATUTORY CONSTRUCTION—COSTS.

The term "costs," as used in sec 969, Gen. Stats., includes whatever the law officers may legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial.

3. EVIDENCE.

Evidence is admissible in an action on a recognizance which tends to show the circumstances under which the officer went to another state after the principal, and to demonstrate that his going was not the result of a contract between him and the sureties, but an execution of the law under an arrangement with the governing body of the county.

4. PRACTICE—IMMATERIAL ERROR.

Where under the pleadings the only issue to be tried was as to what costs were properly taxable against the sureties on a recognizance, they will not be heard to complain that the judgment was only for the amount of such costs and for less than the amount of their bond.

Appeal from the District Court of Logan County.

Mr. CHARLES L. ALLEN, for appellants.

Mr. S. A. BURKE, for appellees.

BISSELL, J., delivered the opinion of the court.

George M. Parkins was indicted by the grand jury for the crime of killing stock. Having been arrested under the indictments he entered into a recognizance in the sum of \$600, according to the statute, conditioned as provided by law, with the appellants, Ayres and Wood, as his sureties. He

afterwards left the country, and failed to appear as required by the order of court, and the recognizance was duly forfeited. The present suit was brought to recover its penalty, \$600. In the earlier stages of the suit various questions were raised, but these were all eliminated by the subsequent answer which the sureties filed, and it left but one proposition in the case. The answer substantially alleged that notwithstanding Parkin's failure to appear according to the terms of the bond, the sureties, prior to any recovery of judgment against them, caused the principal to be seized and surrendered to the sheriff of Logan county, and received from him a written receipt acknowledging the surrender. They announced themselves ready and willing to pay the costs, and averred that they employed a messenger to go for Parkins on a promise to pay the actual expenses, and that the messenger received from Logan county \$330. This was all the substantial portion of the answer, although there was an immaterial averment that the county acted as a volunteer in making the payment, and that the controversy was as to whether these expenses were legitimately taxable as costs against the sureties, which they were obligated to pay under section 969 of the General Statutes, in order to escape a liability for the full amount of the bond.

This is really the only legal proposition presented to the court which requires either discussion or analysis. There was considerable controversy on the trial as to the circumstances connected with the going of the sheriff of Logan county to Ohio to bring Parkins back. The appellants contended that he went under their employment, while the people asserted that he went as the officer of the county under an arrangement with the board of county commissioners, who were obligated to pay him a definite compensation for his labor, which they subsequently discharged by giving him a warrant therefor, which was paid. The trial court found this fact with the people, and the finding is so well justified by the evidence that this court, whatever its opinion might be, would be disinclined to disturb the judgment in that partic-

ular. It is undoubtedly true that the sheriff went at the instigation of the sureties. Possibly this was essential to their defense that they were entitled to be released from the bond, upon the production of the receipt of the sheriff, for the body of their principal, providing they paid whatever expenses were incident to the capture of the fugitive. It is not clear, however, that the sheriff went by virtue of their employment, or accepted their responsibility. It remains manifest that the sheriff went to Ohio after Parkins as an officer of the law of Logan county, under an employment and an agreement with the properly constituted government of that organization, and that what he was to receive as compensation, and what he disbursed, were legitimately costs connected with the return of the fugitive. It must be true that these expenses and disbursements and this compensation were the costs provided for by section 969 of the statutes, which these sureties must pay if they would escape an absolute liability for the entire amount of their obligation. What the result would have been had they employed a private messenger, and succeeded in bringing the fugitive within the custody of the sheriff without any expense to the governmental officers, leaving unpaid only the ordinary taxable costs of the clerk and sheriff, it is wholly unnecessary to determine. Parkins was brought back through the instrumentality of the officers of the county, who were requested to act by the sureties in respect of this matter. It was entirely legitimate to use the process of the law for the purpose, and to secure a requisition from the governor which would be a sufficient legal warrant to authorize the officer to act in a foreign country. So long as the county was willing to proceed to secure the return of the fugitive by the means at its disposal, and this proceeding was had at the instance and request of the sureties, they must be held to be liable for all legitimate disbursements and costs attending the proceeding, if they desire to invoke the statute in order to escape liability for the sum total represented by the obligation into which they voluntarily entered. Having pleaded as a defense sim-

ply that they were not liable upon the bond, because they had secured the return of the escaped prisoner into the custody of the sheriff of Logan county, and could not be held for the penalty, provided they paid the costs as to which they offered to reimburse the county, they cannot now be heard to insist that the one thing chargeable against them are the costs which the clerk might tax, and the fees which the sheriff might be entitled to receive, on the service and return of the papers. The phraseology of the statute is broad enough to warrant the interpretation that it intended to impose on the sureties a liability for whatever might be expended in securing the return of the escaped criminal, if their liability was to be measured not by the bond but by the costs of the return. It could not have been in the contemplation of the legislature that the fugitive should be returned through the acts of the sureties other than what might be essential to set the law in motion, since as individuals they would be powerless legitimately to bring the fugitive within the sovereignty from which he might have escaped. Under these circumstances the term "costs" as used in that section must be adjudged to include whatever the law officers might legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial. It does not lie with the appellants to complain of this interpretation, since thereby they escape the greater liability of a voluntary obligation, which could otherwise be enforced as to its entire penalty.

This court is entirely disinclined to disturb the judgment on that assignment of error which insists that the court's findings with reference to the contract is unsupported by the testimony. In the first place, this court would not feel warranted in reaching a different conclusion, unless the result was manifestly unsupported by the evidence. Not only is this not true, but it is fairly certain that the court's conclusion concerning the original arrangement under which the sheriff went to Ohio after the prisoner is fully justified by the testimony.

The assignments of error which are based on the alleged

errors of the court in receiving the testimony offered on the hearing do not seem to be well supported. That which is complained of is clearly illustrative of the circumstances which led to the going of the sheriff for the prisoner, and was evidently admissible as tending to show not only the circumstances under which the officer went, but to demonstrate that his going was not the result of a contract between him and the sureties, but an execution of the law under an arrangement with the governing body of the county, afterwards ratified and made legal by legitimate and proper official action. It is complained that the court erred in entering judgment for \$330, instead of for \$600, which was the amount of the bond. It is not easy to see how this gives the sureties the right to complain. Possibly if the judgment had been entered on an erroneous legal basis, they might be justified in contending that it was improperly entered, although the amount was less than that for which they were liable. However this may be, it cannot in this instance be successfully used as an assignment of error, since under the pleadings the only issue to be tried was as to what costs were properly taxable against them, and as to what was included in the term "costs" for the purposes of a proper judgment. The court's conclusions in respect of these matters were in harmony with the law, and the judgment as entered correctly held the sureties liable for the sum found to be due.

The court committed no error during the progress of the trial, and entered a judgment which accords with both the law and the facts. There being no error in the record on which the judgment should be disturbed, it must be affirmed.

Affirmed.

KELLEY ET AL., PLAINTIFFS IN ERROR, v. ANDREW, DEFENDANT IN ERROR.

1. FORCIBLE ENTRY AND DETAINER—EVIDENCE.

A plaintiff in forcible entry and detainer cannot recover upon constructive possession evidenced by deeds conveying the fee.

2. SAME.

Ordinarily evidence of title is inadmissible in that action, either for the purpose of establishing the possession or character of the entry; but this rule is subject to an exception in the case of an occupant of a part of the public domain, where his muniments of title are admissible simply as evidences of staking and holding which he is required by statute to prove, in addition to his peaceable occupancy, to entitle him to maintain the action.

3. FORCIBLE ENTRY AND DETAINER—PRACTICE.

The defendant in an action of forcible entry and detainer cannot set up title in himself and thereby defeat the plaintiff's right to recover on the basis of his peaceable occupancy.

4. JURISDICTION OF JUSTICE OF THE PEACE.

Justices of the peace have jurisdiction in actions of forcible entry and detainer, and such jurisdiction is not divested by a plea setting up that the defendant is in peaceable possession of the premises by virtue of certain conveyances.

Error to the County Court of Pueblo County.

Messrs. KERR and DENNIN, for plaintiffs in error.

Mr. C. J. HART, for defendant in error.

BISSELL, J., delivered the opinion of the court.

As nearly as may be gathered from the very meager and insufficient record on which error is prosecuted in this case, early in the eighties J. J. Kelley settled on a part of section 31, which was then, and at the commencement of the suit, a part of the public domain of the United States. The land was adjacent to the city of Pueblo and on what would have been a continuation of Santa Fe avenue, if that street ran

through the section. He built some sort of a structure on a part of his premises, and apparently occupied a strip of land some sixteen feet wide alongside of the building. Subsequently and in 1889 the property passed into the possession of Joseph Andrew, the present defendant in error. For the purpose of rendering the present controversy intelligible, it may be stated that before either of the parties to the present suit acquired any interest in the property, J. J. Kelley, the husband of Eldora, deeded his interest in this settlement to Eldora Kelley his wife, who subsequently, by a bill of sale, attempted to transfer her interest to Joseph Andrew, the defendant in error. To confirm the transfer, J. J. Kelley likewise deeded his interest to Andrew by deed of quitclaim. It would seem that doubts arose as to the character of this transfer, because subsequently Kelley attempted to convey the identical property to his codefendant in error, George Roesch. These facts are gathered from the pleadings in the case and from the deeds which were introduced in evidence. Some of them are very manifest from the abstract, and others are probably legitimate deductions from its contents. In 1890, Andrew brought forcible entry and detainer against J. J. Kelley and Roesch to recover the possession of the premises. The action was aptly brought, on a sufficient complaint, and the plaintiff must have recovered, if it had been supported by competent and sufficient testimony. There was a paragraph in the complaint which stated the plaintiff's entry by virtue of the transfers from the Kelleys to him. The defendants answered, denying the peaceable entry, the possession, and all the other material allegations of the complaint, and concluded with a clause averring their entry by virtue of conveyances from the original occupant. During the progress of the trial the bill of sale from Eldora Kelley to Andrew, and the deed whereby J. J. Kelley's interest became vested, if at all, in Eldora, and therefore in Andrew, were offered in evidence. The defendants objected, but on what grounds the record does not disclose. They were received and are found in the abstract. When the defense was put in, the deeds by

which it was contended that Eldora Kelley's title became vested in Roesch and J. J. Kelley were likewise offered and received. Whatever other evidence may have been introduced on the trial is entirely omitted. The plaintiffs in error rely solely on the contention that to admit the deed from Kelley to Andrew, and the bill of sale from Eldora Kelley to Andrew, was error which will necessitate the reversal of the judgment entered for the plaintiff.

This cannot be conceded. Many of the arguments advanced in support of the position are undoubtedly based upon well established principles of law. A plaintiff in an action of forcible entry and detainer cannot recover upon the constructive possession which would be evidenced by the conveyance of the fee title from its original source, and ordinarily evidence of that title may not be produced either for the purposes of establishing the possession, or establishing the character of an entry. *Hoag v. Pierce et al.*, 28 Cal. 187; *Kepley v. Luke*, 106 Ill. 395; *Jenkins v. Tynon*, 1 Colo. Court of Appeals, 133.

Actions of forcible entry and detainer must generally be controlled and tried according to these very well established rules. But the present case furnishes an exception to the doctrine, and the exception, like all others of that description in this particular procedure, is based on the necessity of the case, and the provisions of the statute. Under the law of Colorado the public domain is open to the occupancy and use of its citizens until such time as the government may see fit to part with its title. It is needless to determine what are the steps prerequisite to securing that right of occupancy which may be defended in the courts by all the possessory actions which may be resorted to by the holder of a fee title. It is enough to say that such title may be acquired, and that it may be defended according to the terms of the act by various actions, among which is that of forcible entry and detainer. The statute, however, puts a limitation upon the right to maintain these possessory suits by providing as a condition precedent that the boundaries of the claim shall be

marked and staked by the holder. Under these circumstances, it is undoubtedly incumbent on the plaintiff in the action to show the segregation of the land of which he claims to be in the peaceable possession, and on which he asserts the defendant entered, and that it was segregated in the fashion pointed out by the statute to entitle the holder to protect his occupancy. These rights of occupancy which have been acquired under the statute are by it made the subject of transfer and sale. Since these things are true, it must be competent for the plaintiff who seeks in an action of forcible entry and detainer to recover the possession of a part of the public domain which he occupies, to establish the act of the original settler and his compliance with the statute. As the occupant is by the statute required neither to cultivate nor to be actually present on the entire holding of the amount of land to which he may be entitled, to wit, 160 acres, it becomes necessary for him to prove the staking by the settler, and the filing of the declaration provided for by the act to show the fact of his possession. As a necessary consequence he may produce the transfer from the occupant to him. In this wise, and being offered solely for this purpose, neither the declaration nor the deed are to be taken as evidences of title, or as giving to the plaintiff the right to recover on the strength of his constructive possession, but they are simply evidences of the staking and the holding which the statute says he must prove, in addition to the peaceable occupancy, to entitle him to maintain the action. It has been held in California, in one of the cases cited, that the plaintiff may introduce his muniments of title in a case of this description for the purpose of showing the boundaries of the property which he claims, where, in a sense, there could be no actual occupancy of the entire tract. The peculiar character of the possession which a person may acquire of the government domain necessitates this exception to the general rule concerning the introduction of evidence of the right to occupy. Aside from these considerations, the case should not be reversed because these paper evidences of title were introduced, without something

in the record to show that there was no sufficient proof on which the recovery could have been based, aside from the deeds. It is quite possible that the plaintiff may have made ample proof of his possession and clearly established his right to recover without the deeds at all. Under such circumstances, unless it was very clear that the defendants were prejudiced by the production of the deeds, the case would not be reversed, and the error would be held immaterial and harmless.

The plaintiffs in error likewise contend that the action should never have been tried by the justice before whom it was brought, because the question of title was raised by the pleadings. There are two answers to this contention. It is incompetent for the defendant to set up title in himself and thereby defeat the plaintiff's right to recover on the basis of his peaceable occupancy. *Altree et al. v. Moore*, 1 Ore. 360; *Drake v. Newton*, 23 N. J. L. 111; *Bliss v. Bange*, 6 Conn. 78.

In the next place there was no issue as to title raised by the pleadings. The plaintiff simply averred that he was peaceably in possession by virtue of certain deeds of conveyance. The defendant inserted an allegation to the effect that he was in peaceable possession likewise by virtue of sundry conveyances. It cannot be said, however, upon a careful consideration of the complaint and answer, that there was any plea of title which would divest the justice of jurisdiction to hear and decide the action. When the case came to the county court on appeal, it did not err in refusing to dismiss the suit because the justice had been deprived of the right to try the case by such a plea.

There are no errors apparent in the record, and so far as can be seen, the case was properly tried and the right judgment entered, and it will be affirmed.

Affirmed.

SLATER, APPELLANT, v. JACOBITZ, APPELLEE.**1. PLEADING—CAUSE OF ACTION.**

A complaint which shows that one F., having been found guilty of an offense, appealed with the plaintiff as surety on the appeal bond, that afterwards F., and the defendant, for the purpose of indemnifying the plaintiff as such surety, executed and delivered to him a bond conditioned that "if the said F., shall duly appear at the said term of said court and answer the demand of the law thereat, then this obligation to be null and void, otherwise to remain in full force and effect;" that F. failed so to appear, and that in consequence the plaintiff as his surety was compelled to pay a large sum of money,—fails to state a cause of action. Such an instrument is not an indemnifying bond.

2. PAROL EVIDENCE, WHEN ADMISSIBLE.

Parol evidence is admissible to explain latent or inherent ambiguity in a written instrument, but not where its effect would be to make a new and different contract from that made by the parties.

Appeal from the District Court of Bent County.

Mr. O. G. HESS, for appellant.

Mr. J. C. COAD, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

In July, 1887, one N. W. Flaisig was prosecuted in Marion, Kansas, before a justice of the peace for selling intoxicating liquor. He was adjudged guilty and sentenced to pay a fine of \$100 and to be confined in the county jail for a period of thirty days. He prayed an appeal to the district court and executed an appeal bond in the sum of \$600, with A. Jacobitz as surety. Thereafter a bond in words and figures as follows was executed by Flaisig and J. H. Slater, appellant herein.

"Know all men by these presents that we N. W. Flaisig, as principal, and Fourth National Bank of Wichita, Kansas, J. H. Slater, cashier, as sureties are held and firmly bound to

A. Jacobitz, as bondsman of N. W. Flaisig, in the sum of six hundred dollars, the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents. The condition of this obligation is such that whereas the said N. W. Flaisig was on the 1st day of July, 1887, prosecuted before E. Baxter, justice of the peace for said county, on the charge of selling intoxicating liquor in the city of Marion, Kansas, contrary to the statutes made and provided in such cases, and whereas the said N. W. Flaisig was by said E. Baxter adjudged guilty as charged, and was sentenced to pay a fine of \$100 to the state of Kansas and to be confined in the jail of said county for a period of thirty days, and whereas said N. W. Flaisig has appealed from the decision of the said E. Baxter, and whereas the said E. Baxter has adjudged that the said N. W. Flaisig give bond in the sum of six hundred dollars for his appearance at the next regular term of the district court of said county, and whereas the said A. Jacobitz has signed the said appeal bond with the said N. W. Flaisig,

“Now therefore, if the said N. W. Flaisig shall duly appear at the said term of said court and answer the demand of the law thereat, then this obligation to be null and void and of no effect, otherwise to remain in full force and effect.

“Witness our hands this day of July, 1887.

“N. W. FLAISIG,

“J. H. SLATER, Cashier,

“Fourth Nat. Bank Wichita, Kansas.”

Upon this last mentioned bond suit was instituted in the third judicial district of Colorado to recover the penalty mentioned therein.

The complaint alleges the execution of the bond by Flaisig and Slater for the purpose of indemnifying the plaintiff as surety for Flaisig upon the appeal bond; that Flaisig did not appear before the district court in conformity with the condition of the appeal bond, but made default thereof.

Thereafter judgment was rendered and plaintiff compelled to pay the sum of \$672.75.

Trial was had to the court and judgment rendered for Jacobitz in the sum of \$600.

Many errors are assigned why this judgment should be reversed, but we are inclined to the opinion that we need consider none save one, urged upon our attention in the oral argument, to the effect that the complaint fails to state a cause of action. A careful reading of the bond sued upon, conclusively shows that it is not an indemnifying bond. The condition of the bond is that Flaisig shall appear at the term of the district court * * *. But it in no sense recites that in case the plaintiff Jacobitz shall suffer by reason of becoming surety for Flaisig, or that in case Jacobitz shall pay or be compelled to pay the penalty of the appeal bond, then and in such case the parties will indemnify him. Taking the bond as it reads, it would allow Jacobitz the right of action against the plaintiff, regardless of whether or not he satisfied the conditions of the appeal bond and paid the penalty nominated therein, provided Flaisig failed to appear in the district court. Besides, we may add oral proof contradicting the recital in the bond, and making it a bond of indemnity was clearly inadmissible. No rule of law is better settled than that parol testimony is admissible to explain latent or inherent ambiguity, but in this case none exists. The effect of the testimony was to make a new and different contract from that made by the parties, and should not have been received.

Our conclusion is that the complaint fails to state a cause of action, wherefore the judgment must be reversed.

Reversed.

PIERSON, APPELLANT, v. WILTON, APPELLEE.

APPELLATE PRACTICE—WEIGHT OF EVIDENCE.

Where there is testimony in the record to support the conclusions reached by the court below, the judgment will not be disturbed on the ground that it is not sustained by the evidence.

Appeal from the County Court of Pitkin County.

Mr. WM. O'BRIEN, for appellant.

No appearance for appellee.

RICHMOND, P. J., delivered the opinion of the court.

This is an action to recover for services rendered. It was originally commenced before a justice of the peace of Pitkin county, where judgment was rendered for Samuel Wilton, appellee. Thereafter on appeal the cause was tried in the county court and judgment rendered for the sum of \$104.41. To reverse this judgment this appeal was prosecuted to the supreme court, and by order of that court transferred to this.

The sole ground relied upon is that the evidence does not sustain the judgment. It is sufficient for us to say that after reading the abstract we are of the opinion that there is testimony to support the conclusions reached by the justice of the peace and the county judge, and that under the innumerable decisions of the supreme court, as well as a large number of decisions by this court, we are not warranted in disturbing the judgment.

The judgment will be affirmed.

Affirmed.

LYNCH, PLAINTIFF IN ERROR, v. METCALF, DEFENDANT
IN ERROR.

3	131
19	503
19	504

ACTION ON INJUNCTION BOND.

An action lies upon an undertaking in injunction against the principal and surety or sureties, without previous adjudication awarding damages against the principal.

Error to the District Court of Arapahoe County.

Mr. R. D. THOMPSON, for plaintiff in error.

Messrs. ROGERS, CUTHBERT & ELLIS, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

The record in this case discloses that on February 1, 1890, in an action brought by Clement B. Smythe against the River and Rail Electric Company and one Stetson Leach and J. Thomas Lynch, plaintiffs below, an injunction bond was issued out of the district court of Arapahoe county enjoining Leach and Lynch from commencing an action upon a certain promissory note executed by the River and Rail Electric Company. That in that action an injunction bond was given in the following words and figures:

“Clement B. Smythe, Plaintiff, v. The River and Rail Electric Co., J. Thomas Lynch and Stetson Leach, Defendants. Undertaking in Injunction.

“Whereas, The above plaintiff has commenced, or is about to commence, an action in the District Court of the Second Judicial District of the State of Colorado, in and for the County of Arapahoe, against the above named defendants, and is about to apply for an injunction in said action against the said defendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in said action is more particularly set forth and described,

“ Now, Therefore, We, the undersigned, in consideration of the premises, and of the issuing of said injunction, do jointly and severally undertake, in the sum of \$12,000, and promise to the effect that, in case said injunction shall issue, the plaintiff will pay to the defendant all costs and damages as shall be awarded against the complainant in case the said injunction shall be modified or dissolved in whole or in part.

“ Dated this 30th day of January, A. D. 1890.

“ (Signed) CLEMENT B. SMYTHE,

“ By EDWARD FERRIS, Attorney in Fact.

“ ORLANDO METCALF.”

Lynch and Leach filed a demurrer to the complaint, and while the demurrer was under advisement by the court, plaintiff in the original action on his own motion dismissed it, and said injunction was thereby dissolved at cost of plaintiff.

This action is brought to recover for attorneys' fees and expenses incurred in and about the dissolution of the injunction. A general demurrer was filed to the complaint in this action, which was sustained. Plaintiff in error elected to stand by his complaint, and prosecutes this writ of error to reverse the judgment of the court below.

The grounds urged in the court below and in the briefs on file herein are that the complaint failed to aver that damages had been awarded on the dissolution of the injunction, or at any other time; therefore there was no breach of the conditions of the bond, and consequently no independent suit could be maintained against the principal and sureties for damages. The attorneys for the respective parties have cited many authorities in support of their contentions, but we deem it wholly unnecessary to review them in view of the fact that the code of procedure of this state permits the institution of this action.

Section 161, Session Laws 1887, provides that, in suing on any undertaking provided for in this act, it shall not be necessary to bring suit in the first instance against the principal on such undertaking to ascertain the amount of damages sustained or awarded by the court, but the principal and

surety may be sued together, and at the trial damages may be assessed and awarded against principal and surety in the action.

This provision clearly allows the institution of the suit against principal and surety or sureties upon an injunction bond without any previous adjudication against the principal, and is conclusive of the question. The very purpose of the statute was to cover the grounds of objection raised by the demurrer, and supported by the authorities cited by defendant in error. We assume that the section referred to was not called to the attention of the court below, and that had it been it would not have fallen into the error of sustaining the demurrer to the complaint. *Tabor et al. v. Clark*, 15 Colo. 434.

Our conclusion is that the court erred in sustaining the demurrer to the complaint, and therefore the judgment must be reversed and the cause remanded.

Reversed.

ARTHUR, APPELLANT, v. GARD, APPELLEE.

1. APPELLATE PRACTICE—ASSIGNMENTS OF ERROR—INSTRUCTIONS.

When the entire charge given to the jury is not embraced in the transcript or printed abstract, an assignment of error based upon the giving of a single instruction will not be considered.

2. AGENCY, EVIDENCE OF.

To establish an agency, in the absence of better evidence, it is common practice to resort to facts which tend to show recognition by the principal of the alleged agent's authority. Of this nature are communications between the principal and agent in which the authority of the latter is expressly or impliedly admitted.

3. CONSIDERATION, HOW SHOWN.

A duebill, which states upon its face that it was given on account of an act performed by the payee, shows that it was given upon a consideration.

4. FRAUD MUST BE PLEADED.

Evidence of fraud is inadmissible, unless the facts constituting the fraud have been set up in the pleadings.

Appeal from the District Court of Park County.

Mr. C. A. WILKIN, for appellant.

Mr. V. G. HOLLIDAY, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

E. F. Arthur, appellant herein, was working the Hill Top Mine as lessee, and on February, 1890, he executed the following paper:

“DENVER, Colo., Feb. 24th, 1890.

“MR. J. L. EDMUNDS, DENVER, Colo.

“Dear Sir: You are hereby appointed Superintendent of the Hill Top Mine, in full charge of the practical working thereof, getting out the ore, and hauling it to the cars at Fair-play, under the direction of the assignees of the lease. Your salary will be at the rate of two hundred dollars (\$200) per month, commencing March 1st.

“Yours truly,

“E. F. ARTHUR, Lessee.”

By virtue of this appointment, Edmunds entered upon the duties as superintendent of the mine, and on May 24, 1890, executed a paper payable to H. E. Box, in words and figures following:

“HILL TOP MINE, May 24th, 1890.

“Due to H. E. Box by the lessee of the Hill Top Mine, one hundred and five dollars (\$105.00) for sinking the main shaft 4 × 8 in the clear and timbering the same complete, to the depth of 10 ft. at \$10.50 per foot.

“J. L. EDMUNDS, Sup't.”

On the back of this was the following indorsement: “Payable June 15, by lessee. J. L. Edmunds, H. E. Box.”

On the 24th of May, 1890, R. T. Gard, appellee herein, purchased for a valuable consideration this duebill, and instituted action to recover from Arthur.

By the abstract we are informed that the answer consisted of general and specific denials. A jury trial was had and resulted in a verdict for plaintiff upon which judgment

was entered, and to reverse which appellant prosecutes this appeal.

The principal contention of appellant is that Edmunds had no authority to execute this paper and consequently he is not liable. It is also insisted that the court erred in refusing instructions asked and in instructions given. The instruction complained of is designated as number five and set forth in the abstract. The other instructions are not embraced in the record. Under the ruling of the court we would not be warranted in considering this assigned error.

In the case of *Bradbury & Co. v. Butler & Son.*, 1 Colo. Court of Appeals, 430, it is laid down that where the instructions given by the court are not embraced in the transcript or printed abstract, no error can be assigned upon a single instruction. The language of the court in that case is: * * * "It has been determined in construing a charge to a jury, the entire charge must be considered, and, where the appellant does not embrace within the transcript the entire charge given, the appellate court cannot determine whether or not the jury were misled by the charge to which exception was taken, and also that the appellate court would be unable to determine whether the court erred in refusing the instructions asked, because of its inability to ascertain whether the entire charge embraced the instruction asked. *McQuown v. Cavanaugh*, 14 Colo. 188; *Klink et al. v. The People*, 16 Colo. 467."

This brings us to the consideration of the main point relied upon by the appellant. The record and the evidence show that Edmunds was appointed superintendent by Arthur; that he was authorized to employ men in and about the working of the mine. That it was his custom to give time checks and bills evidencing the indebtedness of the lessee, and that, with the exception of the one sued upon, there appears to have been no controversy during the time Edmunds was acting as superintendent.

The superintendent having authority to employ men to prosecute work upon a mine, if no funds be furnished, the

principal is liable to the workmen. *Breed v. First Natl. Bk. of Central City*, 4 Colo. 482.

To establish an agency in the absence of better evidence, it is the common practice to resort to facts which tend to show recognition by the principal of the alleged agent's authority. Of this nature are communications between the principal and agent in which the authority of the latter is expressly or impliedly admitted * * *. *Union Min. Co. v. Rocky Mt. Natl. Bk.*, 2 Colo. 248.

Let us apply this last recited principle to the following letter:

“DENVER, Colo., 5-9-90.

“MR. J. L. EDMUNDS, FAIRPLAY, Colo.

“Dear Sir: I am just in receipt of a letter from Messrs. Bailey & Wilkin, advising that on the 13th of last month, Mr. M. McLaughlin, then hauling ore for you, was discharged by you, and that at that time, there was due him \$251.76. Mr. McLaughlin has given them his claim for collection, and they state they hold bills formally approved by you, aggregating \$251.76, for which they demand immediate payment. I have replied to them that on receipt of the approved bills I will forward check.

“I wish you would have it distinctly understood with your teamsters or others doing work for you aside from labor, that no bills are payable before the 15th of the month following that in which the work is done; and if you know Messrs. Bailey & Wilkin (which I presume you do, from the fact that they drew up some contracts for you) I would suggest that you see them and quietly say to them that letters such as theirs of May 9th are in very poor taste until a demand has been made for payment in the regular way. We propose to pay all bills as fast as they become due; but do not propose to be bull-dosed by them or any one else.

“Yours very truly,

“E. F. ARTHUR.”

We are inclined to the opinion that the authority to execute the paper declared upon was conferred upon the super-

intendent, and that he was acting clearly within his authority and keeping within the express letter of this instruction. It will be observed that the instrument is dated May 24th, payable June 15th. Also, that the superintendent had executed bills payable to M. McLaughlin, which Arthur fully recognized. But it is insisted that even if the authority did exist, the paper in question was without consideration. It occurs to us that the consideration is expressly embraced in each of the instruments, it sets forth what Box did, to-wit, sinking the shaft 4×8 and timbering the same complete, to the depth of 10 feet, for which he was to receive the sum of \$10.50 per foot. To this the defendant replied, that the shaft was not sunk to the depth of 10 feet, and offered to prove that the depth did not exceed 2½ feet, which proof was rejected. Whether the rejection of this testimony was error or not we are unable to say, because we are not advised by the record what the nature of the defense was. If by this contention defendant sought to attack the paper on the ground of fraud on the part of the superintendent and Box, it was a matter of defense and should have been set up.

The judgment must be affirmed.

Affirmed.

THE BOARD OF COUNTY COMMISSIONERS OF MONTEZUMA COUNTY, PLAINTIFF IN ERROR, v. THE BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY, DEFENDANT IN ERROR.

1. MITTIMUS TO JAIL OF ANOTHER COUNTY.

When a county has no jail, a justice of the peace is warranted in issuing a mittimus to the sheriff of another county to receive the prisoner and keep him in custody.

2. DUTY OF SHERIFF.

A sheriff to whom such a prisoner has been committed is under imperative obligation to receive him.

3. EXPENSES, WHAT COUNTY CHARGEABLE.

The expenses of keeping such a prisoner rests upon the county where the offense is alleged to have been committed, and they must be paid in cash.

4. VENUE.

An action is properly commenced in the county where the cause of action accrued.

Error to the District Court of San Miguel County.

Mr. C. W. BLACKMER, Mr. JOHN DAWSON and Mr. LEWIS K. PRATT, for plaintiff in error.

Mr. H. M. HOGG, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

In June, 1889, George Brown was charged with the crime of being an accessory to the robbery of the San Miguel County Bank of Telluride, Colorado. The offense is charged to have been committed in the county of Montezuma. Hearing was had before a justice of the peace in Montezuma county, and Brown was held to await the action of the grand jury of the district court; failing to give bond and there being no jail in Montezuma county, the justice of the peace committed Brown to the jail of San Miguel county. December 1, 1889, the commissioners of San Miguel county presented its accounts to the county of Montezuma for the board of Brown and other expenses. The bill was disallowed. Suit was brought to recover the sum of \$819, with interest. Motion to quash the summons was interposed and overruled. Thereafter motion to change the venue was made on the ground that the cause of action was not founded on a bill of exchange, promissory note or book account, or for goods sold and delivered, or a contract to be performed in San Miguel county; that the liability of Montezuma county, if any, was statutory and therefore the suit should have been commenced in Montezuma county; this motion was overruled. A demurrer to the complaint was then filed and overruled. Defendant

elected to stand by the demurrer and judgment was rendered for the amount claimed. To reverse this judgment this writ of error is prosecuted.

We experience no difficulty in reaching a conclusion in this case and sustaining the action of the court below. Montezuma county having no jail, the justice of the peace was warranted by the statute in issuing the mittimus, directing the sheriff of the county of San Miguel to receive and keep in custody the prisoner, and the obligation to receive the prisoner is imperatively imposed upon the sheriff and jailor of that county. The burden of the expense of so keeping a party rests upon the county where the offense is alleged to have been committed, and the statute makes it the duty of such county to reimburse the county for expenses incurred in and about the boarding and keeping of a prisoner *in cash*.

There is no escaping the conclusion that the cause of action accrued in San Miguel county, and this being so the right to commence the action in that county cannot be doubted. We think the complaint sufficiently set forth a cause of action, that the suit was properly instituted in the county of San Miguel, and that the action of the court in overruling the demurrer and refusing to change the venue is amply supported by the provisions of the Code and the General Statutes of the state controlling transactions of this kind. Mills Ann. Stats. § 2516; *D. & N. O. Con. Co. v. Stout*, 8 Colo. 61.

The judgment therefore will be affirmed.

Affirmed.

GORDON, PLAINTIFF IN ERROR, v. JOHNSON, DEFENDANT
IN ERROR.

1. RES ADJUDICATA.

A valid judgment by a court of competent jurisdiction between the same parties is conclusive, except where by review, an appeal, or rehearing in some form, is allowed and regulated by law. No man is to be twice vexed with the same controversy.

2. SAME.

It is no objection that the former suit embraced more subjects of controversy, or more matter than the present; if the entire subject of the present controversy was embraced in it, it is sufficient,—it is *res judicata*.

3. SAME.

A decree, dismissing a bill in equity after hearing, is a bar to a subsequent bill between the same parties for the same subject-matter, unless it appears by the record that the dismissal was without prejudice, or otherwise not upon the merits.

Error to the District Court of Arapahoe County.

Messrs. KEELER & SALES, for plaintiff in error.

Mr. O. B. LIDDELL, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

May 20, 1887, G. W. Clise & Co. executed the following contract:—

“DENVER, Colo., May 20, 1887.

“Received of A. M. Gordon ten dollars (\$10), as part purchase price of lots numbered 5 and 6, block 33 Hunt's Add. to the city of Denver; full consideration or purchase price six hundred and thirty-five dollars; the remainder, six hundred and fifteen dollars, to be paid by said Gordon upon delivery of a good and perfect abstract of title and a good and sufficient warranty deed; otherwise this receipt to be void and the ten dollars to be returned to said Gordon.

“(Signed)

G. W. CLISE & Co.”

A. M. Gordon, plaintiff in error, institutes this action against Thomas Johnson, the owner of the premises described in the contract, to enforce specific performance. Among other defenses, Johnson alleges that during the year 1890, and prior to the institution of this action, he commenced proceedings in the county court of Arapahoe county against the plaintiff, Gordon, for the purpose, among other things, of having the contract set forth in the complaint declared null

and void, and for other relief. The entire proceedings in the county court are set forth in the answer. To the complaint in that case Gordon answered, alleging that authority for entering into the contract had been vested by Johnson in Clise & Co. The cause was tried to the court and a final decree entered from which no review was prosecuted.

In the decree of the court it was recited that the identical contract here sued upon was void and of no effect, and was and is no cloud upon the title to the lots. Thereupon the court dismissed the complaint. To this defense, plaintiff, Gordon, filed a demurrer which was overruled. Plaintiff elected to stand by the demurrer and judgment was rendered against plaintiff to reverse which he now prosecutes this writ of error.

The contention of plaintiff is that he is not estopped by the decree in the former case from instituting proceedings for specific performance of the contract—that it is not *res adjudicata*.

The contention of defendant is that as the suit there was between the same parties here and involved the validity of the identical instrument upon which this action is based, and the finding of the court being that the instrument was null and void, no subsequent action can be predicated upon it.

Plaintiff's counsel admit in their argument that the former suit was for the purpose of annulling the contract, and for the cancellation of it for the purpose of removing the alleged cloud upon the title of Johnson to the premises, but contend that the decree entered is not a bar to the present suit, because it resulted in a dismissal^o of the plaintiff's complaint in that action.

The contention of plaintiff in error, that in the former action Johnson sought simply to remove the cloud upon his title to the premises, and that when the court found that the instrument complained of was not a cloud upon his title it had reached the limit of its jurisdiction by dismissing the bill is, in our judgment, without support in reason or by authority. It is true that if the court had found the instrument to

be valid, duly and regularly authorized, and on that ground had dismissed the bill, it would have been no bar to the future action for specific performance. But such is not this case, and consequently the reasoning and illustrations in the brief are not applicable. The main purpose of the former proceeding was to secure an adjudication relative to the validity or invalidity of the instrument here sought to be enforced. This issue was presented by the pleading in that case and was directly adjudicated by the decree of the court, which it had an undoubted right to do. It found that the instrument was void for want of authority; that Johnson was in no way bound by the action of Clise & Co.; that Clise & Co. had received no authority direct or indirect from Johnson to make the contract; that the instrument was absolutely invalid and consequently was no cloud upon the title of Johnson. Hence it is concluded that the relief sought, so far as it affected the title to the premises, could not be granted. The question there and the question here is precisely the same, to wit, the validity or invalidity of the instrument sought to be enforced. Here the party seeks specific performance of a contract and must necessarily establish his right to a decree of such performance by proving the validity of the instrument which he seeks to enforce. In the former suit Johnson denied the validity of the instrument, declared it was made without any authority from him, and sought to have it removed and canceled upon the record as being a cloud upon his title. This makes an entirely different case from any relied upon in the brief of counsel, but, on the contrary, brings the issue here presented directly within the principles contained in the following cases.

In *Durant v. Essex Company*, 7 Wallace, 107, Mr. Justice Field, in his opinion, says: "The decree dismissing the bill in the former suit in the circuit court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A de-

cree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.

"Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice."

In the case of *Bigelow & Another v. Winsor*, 1 Gray, 299, this language is used: "One valid judgment, by a court of competent jurisdiction, between the same parties, upon considerations as well of justice as of public policy, is held to be conclusive, except where a review, an appeal, or rehearing in some form, is allowed and regulated by law. No man is to be twice vexed with the same controversy. *Interest reipublicæ ut finis sit litium.*"

"To ascertain whether a past judgment is a bar to another suit, we are to consider, first, whether the subject-matter of legal controversy, which is proposed to be brought before any court for adjudication, has been drawn in question, and within the issue of a former judicial proceeding, which has terminated in a regular judgment on the merits, so that the whole question may have been determined by that adjudication; secondly, whether the former litigation was between the same parties, in the same right or capacity litigating in the subsequent suit, or their privies respectively, claiming through or under them, and bound and estopped by that which would bind and estop those parties; and, thirdly, whether the former adjudication was had before a court of competent jurisdiction to hear and decide on the whole matter of controversy, embraced in the subsequent suit."

"It is no objection that the former suit embraced more subjects of controversy, or more matter than the present; if

the entire subject of the present controversy was embraced in it, it is sufficient, it is *res judicata*."

In *Foot & Another v. Gibbs & Others*, 1 Gray, 412, it was held that, "A decree, dismissing a bill in equity, after a hearing, is a bar to a subsequent bill between the same parties, for the same subject-matter, unless it appears by the record that the dismissal was 'without prejudice,' or otherwise not upon the merits."

In *Foster & Others v. The Richard Busteed*, 100 Mass. 409, the rule is announced that, "There is no essential difference between the effect of a decree in equity and of a common law judgment, in this respect. A bill regularly dismissed upon the merits, where the matter has been passed upon and the dismissal is not without prejudice, is a bar to future proceedings, either in equity or at law. And under similar circumstances a judgment at law is a bar to future proceedings in equity."

This doctrine is followed and affirmed in *Blackinton v. Blackinton*, 113 Mass. 231.

This being so and recognizing the above principles, we have no alternative left but to say that the action of the court below in overruling the demurrer to the fourth defense was right and that the former proceedings constituted an absolute bar to the action.

The judgment will be affirmed.

Affirmed.

PUTNAM ET AL., APPELLANTS, v. LYON, APPELLEE.

1. PRACTICE—CONSOLIDATION OF ACTIONS.

When actions are pending between the same parties upon different causes which might have been joined, the court may order them consolidated and tried as one suit.

2. PRACTICE—PENDENCY OF ANOTHER ACTION.

When two actions are commenced upon the same cause, the remedy of the defendant, if he would avoid the vexation of two suits for the

same thing, is to plead the pendency of the first in abatement of the second.

3. APPELLATE PRACTICE.

Mere irregularities, resulting in no harm to the appellants, do not warrant a reversal.

4. SAME.

Appellants are not permitted to complain in an appellate court for the first time that the proper parties were not brought into the litigation prior to the decree.

5. SAME.

An order entered upon consent cannot be assigned as error.

6. COSTS IN EQUITY CASES.

The taxation of costs in an equity case is largely within the discretion of the trial court, and its action in this respect will not be disturbed except where there has been a plain and palpable abuse of discretion.

7. ADMISSION IN PLEADINGS.

Facts alleged in the complaint and not denied by the answer are to be taken as true, without proof.

Appeal from the District Court of Boulder County.

EARLY in 1882 Adaline A. Lyon was the owner in fee of the southeast quarter of section 18 in township 3 in Boulder county. On the 29th day of April, 1880, while she held title she executed a trust deed running to one Laws as trustee to secure the payment of a promissory note due five years from that date. While this note was outstanding it was determined to lay out the land as a town site. To more successfully accomplish this purpose Mrs. Lyon deeded the premises to The Evans Townsite & Quarry Company, subject to the trust deed before mentioned. The stock was delivered to her in discharge of the expressed consideration, and the company assumed the payment of the trust deed. Mrs. Lyon contended that it was agreed by the representatives of the corporation that she should receive as a further payment a deed to lots 1 to 8 in block 32 and a lot in block 29 in the town site. The present controversy grows out of the alleged reservation, and the execution of the deed by which it is claimed the company transferred title to these reserved lots. After the organization of the company and the delivery of

Mrs. Lyon's deed, negotiations were initiated with one of the defendants, Putnam, for the sale to him of the entire property held by the Townsite & Quarry Company. The terms were agreed on, the property transferred to Putnam, who paid the entire purchase price except what was represented by the outstanding trust deed which he was to assume and ultimately discharge. At the time of the sale to Putnam, the trustees who negotiated it insisted that the transfer should not cover the property antecedently sold and reserved as the result of their dealings with the addition. The trustees kept no adequate records by which they were able to accurately determine just what they had disposed of. An examination of the title raised doubts concerning it. To perfect this title and relieve it from all embarrassments, it was agreed that the property should be sold by a foreclosure of the trust deed, and Putnam should buy it in at the sale. The sale was had, Putnam bought it, and ultimately paid the note. After the sale Putnam leased some of the disputed lots to Mrs. Lyon. Afterwards a dispute arose between Putnam and Mrs. Lyon over her claim to the eight lots in block 32 and the lot in block 29. She brought the present action against the Townsite Company and Putnam in the district court of Boulder county to establish her title to this portion of the land. According to her bill and the proofs, the deed under which she claimed was executed by only two of the directors of the company. There was no seal attached, and in some other unessential particulars it was defective. It was alleged that the purchaser knew of Mrs. Lyon's claim of title, and of her unrecorded deed, and that he was not, therefore, an innocent purchaser.

While this suit was pending in the district court, Mrs. Lyon commenced another suit in the county court of Boulder county against the Townsite Company and Putnam, wherein she sought substantially the same relief. While that suit was pending in the county court, one Meily intervened and set up that he was a subsequent purchaser of the property for a valuable consideration without notice of Mrs. Lyon's claim

or equities. By his petition of intervention he sought to have his title adjudged good. While this suit was undetermined in the county court, Putnam on his own motion was stricken out as a party and his answer removed from the files, so that it stood as a suit against the Townsite Company and Meily. This suit subsequently reached the district court by appeal and was on the docket before a trial order was entered in the present suit. The plaintiffs moved to consolidate the two suits and try them as one, and the order was accordingly entered. On the final hearing, a decree was entered reforming the plaintiff's deed and establishing her title to the lot in block 29. It likewise established Meily's title to lots 1 to 8 in block 32, and in distributing the costs, taxed against the plaintiff all the costs in the suit brought in the county court, and rendered judgment against Putnam and the Townsite Company in the suit originally brought in the district court. No objection was made to this decree and no exception taken to its entry. The latter suit was the one first started. During the pendency of the litigation the death of Mrs. Lyon was suggested, and on motion of plaintiff's attorneys Edward S. Lyon, her husband, and executor of her last will and testament, was substituted as party plaintiff. The defendants made no objection to the entry of the order, and the action proceeded in his name, although it transpired that by the terms of Mrs. Lyon's will, Edward S. was devisee for life of the property, and the children were remainder-men in fee.

Messrs. BROWN & PUTNAM, for appellants.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court. •

While all of the proceedings in the district court were not strictly in harmony with the practice which should prevail in this class of cases, the court committed no substantial error

of which the appellants can complain. Their first attack is on the order of the court which consolidated the two actions for the purposes of trial. Section 20 of the Code, which they cite in support of their contention, undoubtedly provides that, where two actions are pending on two different causes of action between the same parties which might properly under the code have been joined, the court may order them consolidated and tried as one suit. The present case does not come within the purview of that statutory provision. It only relates to the joinder of different suits which have been brought on different causes of action. In the present case there were two suits brought on the same cause of action, the one against the Townsite Company and Putnam, to which Meily as an intervenor became a party, and the other against the Townsite Company and Putnam alone, in a different tribunal. When the action was instituted in the county court against the Townsite Company and Putnam, the suit against the same parties on the same cause of action was still pending in the district court. In commencing the first action in the district court the plaintiff merely exercised the right granted him by the law and was entitled to prosecute that suit to final judgment. His attempt to exercise the same right a second time could have no possible effect upon his first cause of action, and the only remedy open to the defendants, when vexed by two suits for the same thing, was to plead in abatement to the second action the pendency of the first. Failing to do this, it was not error for the court to direct that the two suits be tried together, for in the exercise of its power in this direction it simply brought into the first suit another party, Meily, the determination of whose rights was essential to a complete settlement of the controversy. It might perhaps have been more in accord with the usual practice to have restrained the plaintiff from maintaining the second action until the determination of the first, and to have ordered him to bring into that suit all persons whose interests must be ascertained in order to completely settle the dispute, and when the final decree should have been rendered, have

entered in the other suit an order of dismissal, with costs against the plaintiff. Which ever practice would be the more regular and the more exact is of little consequence, since no harm came to the appellants from the course which the court took in the premises.

When the suit was revived in the name of the executor the defendants made no objection, but took an order substituting the executor as a defendant in the cross bill which they filed. It is quite true that under the will the title to this land passed to Edward S. Lyon as the tenant for life, and the remainder passed in fee to the surviving children. In an action which concerns the title to realty, the tenant for life at least, if not also the remainder-men, are the real parties in interest in whose names and right the suit should be prosecuted to judgment. This concession does not make the order of the court in the premises an error which can now be insisted on. It is not permitted to the appellants for the first time to complain in an appellate court that the proper parties were not brought into the litigation prior to the decree. If they desired Lyon in his capacity as tenant for life, and the children as remainder-men to be present, it was for them to object to the substitution of Lyon as executor, and to insist on the necessity for the presence of the other parties. Consenting to the order as entered, they will not now be heard to complain that it was erroneously made.

In the final decree, it was provided that the defendants should recover from the plaintiff \$300 as damages for the detention of lots 1 to 8 from the time of the sale to the time of the entry of judgment. These damages it is insisted are totally inadequate, and that on the record it is evident the finding should have been for a sum largely beyond this amount. This is not clear. These lots were totally unimproved, and at the time of the transaction seem to have been offered for sale at fifty dollars a lot, and the sum entered as damages would be the rental value figured at twenty per cent of their selling price. At least this is as nearly as may be gathered from the record on this subject. The actual value of their

use was not clearly nor satisfactorily shown, and there is no data which would enable this court to say that the court's finding of the amount of damages was totally unsupported by the testimony. Since this is true the decree cannot be disturbed because of this alleged error.

As has already been stated, the costs of this suit were adjudged against the defendants, and the costs of the suit in the county court against the plaintiff. This is made the basis of complaint by the appellants. It does not appear that Meily appealed from the decree, nor that there was any specific decree against him for costs at all. Judgment passed in his favor establishing his title to the eight lots with which he is apparently contented. Neither Putnam nor the Townsite Company can make the action of the court the basis of an assignment of error. The plaintiff recovered part of the property to which he claimed title, and in respect of these rights was entirely a successful litigant. In any event, the case being one in equity determinable by the court on the evidence before it, the matter of costs is so largely within the discretion of the chancellor that except in a case where there has been a plain and palpable abuse of it his action will not be disturbed. *Ratcliffe et al. v. Dakan et al.*, 16 Colo. 100.

The remaining ground of the appellants' complaint is that the decree restrains Putnam and the Townsite Company from interfering with the streets and alleys contiguous to the lot adjudged to belong to Lyon, and laid out on the plat originally filed by the Townsite Company. It is insisted that the absence of evidence to establish the plaintiff's right to the streets and alleys as platted, and to show the attempted interference of the defendants therewith, leaves the decree without the support of necessary proof. It is wholly unnecessary to discuss what might have been the rule concerning the necessity of proof on these subjects, had an issue been tendered which laid the burden on the plaintiff. According to the amended complaint and the amended answer, the plaintiff sufficiently averred his rights and adverse action by the defendants to entitle him to a decree in his favor in respect

of these matters, if his allegation were admitted. The amended answer takes issue on none of these averments. What is said in the cross complaint on this subject need not be considered, since in no event can that be taken as a denial of the plaintiff's complaint. The admissions which follow from the failure to deny relieve the plaintiff of the necessity to make proof, and entirely justifies the decree entered.

The preceding discussion disposes of all the errors discussed by counsel in their brief. The decree was justified by the proof, and is correct under the law, and since the court committed no substantial error in the trial of the case, the judgment must be affirmed.

Affirmed.

DONOVAN, PLAINTIFF IN ERROR, v. GATHE, DEFENDANT
IN ERROR.

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STATUTE OF FRAUDS.

A sale of chattels unaccompanied by an immediate delivery, and an actual, open and unequivocal change of possession, exclusive of the vendor, is void as against creditors.

Error to the County Court of Phillips County.

Mr. W. T. ROGERS, for plaintiff in error.

No appearance for defendant in error.

BISSELL, J., delivered the opinion of the court.

By the sale of some chattels Joshua Stone became, in the winter of 1889, a creditor of Mrs. E. M. Freeman, who lived in Holyoke, Colorado. This debt afterwards became the property of the plaintiff in error, James Donovan, who brought this suit to recover it, and sued out a writ of attachment to

aid in its collection. For some months prior to the time the writ was served, Mrs. Freeman had been the owner and keeper of what was called "The Star Meat Market" in the village where she lived. From early in October, 1889, down to the time of the alleged sale on the 4th of February, C. E. Gathe was in her employ, working about the market. Early in February Mrs. Freeman seems to have become somewhat embarrassed, and on the fourth day of that month executed to Gathe what purported to be a bill of sale of the market and its contents. On the 6th, two days later, Donovan instituted suit against Mrs. Freeman, sued out his writ, and levied on part of the contents of the shop to satisfy his claim. Gathe filed what purported to be an affidavit under the justice's act to assert his title to the property. The claim of this intervenor was resisted by Donovan upon two grounds; first, that the paper which he filed in court did not comply with the requirements of the statute relating to interventions in justices' courts; and, second, because there was no such visible and notorious change of possession of the property transferred to Gathe as would vest him with the title against existing creditors or innocent purchasers. In reality these are the only two questions presented in the case. The testimony concerning these matters can scarcely be said even to be conflicting. What has been antecedently stated is not denied, and what the case shows on the subject of the transfer of possession is about equally well established. In respect of this last matter the record shows that Mrs. Freeman lived in the rear of the shop which was used as a meat market. Prior to February 4th she was the declared and ostensible owner of the property, and probably for the major part of the time was in the market engaged in selling meats, taking the money paid therefor, and looking after the business generally, aided and assisted solely by the intervenor Gathe. From the date of the alleged sale on the 4th of February to the time of the levy of the writ, there was, so far as the world was concerned, no change either in the apparent possession, or the exercise of the apparent rights of ownership.

According to the testimony of Gathe, the intervenor, "after February 4, 1890, she was in the shop the same as before, selling meat and taking in money, but she was at work for me. There was nothing done, only I told several parties I bought her out. Did not put up any new sign or take down any; there was none there only 'The Star Meat Market.' I was going to put notice in the paper, but did not have time. Was closed up February 6, 1890, and opened up again February 10, 1890. Then I went and had some bills printed. A few days after that I put them up in the shop." Mrs. Freeman, the alleged vendor, gave the same testimony. One of the defendant's witnesses had a conversation with Mrs. Freeman the day following the sale, and to him she stated, when asked whether she had sold out, "They say I have," and after repeating this remark several times finally said, "I sold out to that man." There was no testimony whatever offered by the intervenor, nor is there any contained in the record which in any manner tends to show that after the transaction between Mrs. Freeman and Gathe anything was done to notify the world of the change of ownership, or that there was any alteration in the possession of the property. On this evidence judgment was entered for the intervenor, the property was released from the attachment, and the attaching creditor brings error.

That the sale was void under our statute of frauds as against creditors or *bona fide* purchasers for value is not open to question. The statute has been repeatedly construed, and it is universally held that to make a sale valid as against creditors or purchasers the transfer of possession must be complete, and the purchaser's control of the property must be open and notorious, and such as to advise the world of the change in the title. It has been said: "the vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by

the vendee using the usual marks or *indicia* of ownership and occupying that relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible." *Cook v. Mann*, 6 Colo. 21; *Wilcox et al. v. Jackson*, 7 Colo. 521; *Bassinger v. Spangler*, 9 Colo. 175; *Atchison v. Graham*, 14 Colo. 217.

Weighed and considered in the light of the principle declared in these cases, the evidence did not justify a finding in favor of the intervenor. There was no attempt to alter the apparent relation of the parties, or to change the possession and control of the property. If the question of good faith were permitted to enter into the determination of the question, very grave doubts would arise whether the transaction was a legitimate transfer of property, or was an attempt to hinder creditors in the collection of their just claims against the original proprietor. Whatever may have been the motive, the transaction cannot stand as against the attaching creditor.

It was somewhat seriously contended in argument that the court erred in treating the paper filed by the intervenor as an affidavit under the statute entitling him to be heard in the assertion of his claim of title. There is a good deal of doubt whether the affidavit was in the prescribed form. The affiant failed to point out, or specify, or describe, the property to which he claimed title, and there was nothing in it which could be considered to be even a substantial compliance with this statutory requisite. It is unnecessary to determine whether it might be held sufficient after judgment to uphold the recovery, since on the main question presented the finding is against the intervenor and he can never recover under his evidence.

For the error committed by the court in adjudging the title to be in the intervenor as against the attaching creditor, this judgment must be reversed.

Reversed.

THE DENVER & RIO GRANDE RAILROAD COMPANY, APPELLANT, v. MORTON, APPELLEE.

1. APPELLATE PRACTICE.

Where there is an entire absence of proof of a fact which must be established to entitle the plaintiff to recover, the judgment will be reversed.

2. EVIDENCE.

That a fire broke out and burned along the line of a railway, is not evidence that it was caused by the railroad company.

3. NEGLIGENCE—EVIDENCE.

Acts which follow an injury cannot be proven, in civil actions, for the purpose of establishing an antecedent negligence. That a railroad company aided in putting out a fire burning along its track does not tend to establish the fact that it caused the fire.

4. CONTRIBUTORY NEGLIGENCE.

Where the plaintiff was guilty of contributory negligence, he cannot recover on account of injuries to which his negligence contributed.

Appeal from the District Court of Gunnison County.

Messrs. WOLCOTT & VAILE, for appellant.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

In the latter part of this year 1889 the appellee Morton owned a ranch in Gunnison county which abutted the right of way of the Rio Grande Railroad. About the middle of October a fire broke out on the land and burned over quite a portion of the farm. This action was brought against the railroad company to recover the resulting damages. The liability of the corporation to respond if the fire was occasioned by its trains was not disputed. Morton recovered judgment for \$150. The railroad company appealed to the supreme court, which transferred the case to this court for determination. A good many questions are raised by the assignments

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of error, but there are only two which deserve any substantial consideration. The appellant insists that the judgment ought not to stand, because there was no evidence that the fire was set out by the railroad company. Usually questions of fact which are submitted to the consideration of a jury and are determined adversely to a party will not be considered by an appellate tribunal, where there is any conflict concerning the disputed matter. With the weight and the sufficiency of testimony we ordinarily have little concern. But where, as in this case, there is an entire want of proof of a fact which must be established to entitle the plaintiff to recover, we feel little hesitation in reversing a case on this ground. This circumstance furnishes an exception to the general rule, and appellate courts do not scruple to overturn judgments which are entirely without a sufficient basis of proof on which to rest. *Keating v. Pedee*, 2 Colo. 526; *Hockaday v. Goodwin*, 1 Colo. Court of Appeals, 90.

The difficulty experienced in trying causes like the present comes from the fact that under our fire statute a railroad company is made absolutely liable for all fires occasioned by their operation of the road. Whenever a fire breaks out along the line it is assumed that it was set out by the company, and the injured party has little difficulty in convincing a jury of his right to recover. The record contains no proof of this essential fact. When it broke out Morton was not in the vicinity. There was no witness produced who saw the fire set out, and none who discovered it until it had gotten under very substantial and considerable headway. Morton did not know of it until he returned about two o'clock, when some twenty acres of the land had been burned over. By what the fire was kindled, or whether there was any sort of a connection between the running of the road and the breaking out of the fire, was left absolutely undetermined. The jury seemed to proceed on the hypothesis that since there was a fire, and it burned along the line of the railway, the company must necessarily have set it out. Judgment cannot be permitted to rest on such an unsatisfactory basis. There must

be some proof which would at least tend to establish the relation of cause and effect between the operation of the road and the breaking out of the fire. It is true the plaintiff testified that a freight train usually passed along there about half past eleven in the morning. He did not attempt to show that a train passed that point daily at 11:30, nor that any passed that point on the particular day when the fire broke out. There is nothing in the record which furnishes a legitimate basis for the deduction that the fire was occasioned by the running of the company's engines. The plaintiff cannot be relieved of the necessity to support his case by sufficient and competent testimony.

There is another error assigned which is equally fatal to the plaintiff's recovery. It transpired during the trial that after the fire had started quite a gang of men on a freight train under the charge of a railroad employee went to work to put out the fire. According to Morton's testimony the men came from the direction of Sargent, were in charge of one of the railroad employees, and materially assisted in extinguishing it. This circumstance was made the subject of a special charge by the court. In instructing the jury as to where the burden of proof was and what the jury had a right to consider in determining the cause of the fire, the court said:—"And you have a right also to consider upon this question all the other surrounding circumstances connected with the fire, such as the fact, if such existed, that the employees of the defendant company came upon the ground in question and put out, or assisted in putting out, the fire." This was substantially telling the jury that they had a right to consider the fact that the employees of the railroad company assisted in putting out the fire, in determining its cause or its origin. Under no circumstances, without other proof than was disclosed in this case, can this be the law. It is sometimes true in criminal jurisprudence that the subsequent conduct of the person accused of crime may be shown for the purposes of demonstrating his probable guilt. In civil cases, however, the acts which follow an injury cannot be proven

for the purposes of establishing an antecedent negligence. *Morse v. Minneapolis & St. Louis R. R. Co.*, 30 Minn. 465; *Hodges v. Percival*, 132 Ills. 53; *Terre Haute & Indianapolis R. R. Co. v. Clew*, 123 Ind. 15.

If negligence cannot be established by proof of the subsequent acts of the party charged, it is difficult to say why proof that a railroad company aided in putting out a fire should be taken to establish the fact that it was caused by their acts. It does not necessarily follow that the company would not instruct its employees to assist in putting out all fires along the road, when by the terms of the statute they are liable for whatever damages result from fires started by their trains. Even proof that the company issued a general order to its employees to put out all fires discovered along the line of the track could hardly be said to establish that the company's trains set the fire out. Such an order would simply be a prudential measure to protect themselves from all pecuniary loss to which they might otherwise be subject. In other words, it would be cheaper probably to put out all fires found burning along the line of the road, even though four fifths of them might come from extraneous causes, than to pay for one or two fires for which they ought not to be held responsible. The materiality of this instruction and its absolute prejudice to the appellant is apparent, when it is remembered that there was no proof whatever that the fire was set out by the railroad company, and none that it sprung up shortly after the passage of the train.

It is alleged as error that the jury erred in awarding damages for the destruction of a wagon. Morton had left a canvass covered wagon standing in the vicinity for some time, and it was near the fire while it was raging. It was not removed and remained there until it was subsequently consumed. Morton testified that when he left the vicinity to go to the house there was still considerable smoldering fire scattered about the tract. He admitted that it was apparent that in a good many spots the fire was still burning. The wagon was left in dangerous proximity to this unextinguish-

ed fire. Sparks were blown on the cover, it took fire and the wagon was consumed. This loss was part of the subject-matter of the suit and a portion of its value was included in the recovery. The jury found this damage to be seventy-five dollars. In answer to a special question submitted, the jury said that Morton was guilty of contributory negligence in leaving the wagon where it stood when it was destroyed. By their finding they apportioned the damages, found the company liable for two thirds of the injury, and left Morton to stand the balance because of this negligence. While this error would not probably suffice to reverse the case since the judgment could be reduced and still stand, yet in view of the fact of the reversal on the other grounds stated, it is necessary to determine this matter. Evidently if Morton was guilty of negligence in leaving his wagon in the vicinity of the fire before it was totally extinguished, he ought not to recover for its loss. That he was negligent is manifest from the testimony, and is indubitably settled by the special finding of the jury. Under these circumstances he ought not to have had judgment for that item of his damage, and unless the case shall be varied by the proof upon the subsequent trial, it must be eliminated from his recovery.

The case was improperly tried to the prejudice of the appellant, and for the errors committed the cause must be reversed and remanded for a new trial.

Reversed.

REDDICKER, PLAINTIFF IN ERROR, v. LAVINSKY ET AL.,
DEFENDANTS IN ERROR.

1. STATUTORY CONSTRUCTION.

In order to bring a claim within the provisions of sec. 103, Gen. Stats., it must appear that it is an instrument in writing acknowledging an indebtedness and promising payment, which may be made either in money or personal property.

2. PRESUMPTION OF REGULARITY.

Error will not be presumed. Unless error is shown, the presumption is in favor of the regularity of the judgment of the court below.

3. RIGHTS ASSIGNABLE.

Almost every surviving right of action may be assigned so as to enable the assignee to maintain an action thereon in his own name.

Error to the County Court of Chaffee County.

Mr. J. B. McCoy, for plaintiff in error.

Messrs. LIBBY & MARTIN, for defendant in error.

REED, J., delivered the opinion of the court.

Plaintiff in error was plaintiff below ; brought suit against the defendants before a justice of the peace. The case proceeded to trial, and after the plaintiff had closed his evidence, defendants moved for nonsuit on the ground that it was shown that the plaintiff was the assignee of the claim, and as such could not maintain the suit. The motion was overruled and a judgment entered for \$21.00 and costs ; an appeal was taken to the county court, where the proceedings had before the justice of the peace were duplicated ; the same motion made at the same stage of the proceedings, which was sustained, and a judgment entered dismissing the suit at the cost of the plaintiff, from which a writ of error was sued out to this court.

The only question presented is whether the court erred in sustaining the motion. Sec. 103, Genl. Stat., cited and relied upon by counsel of plaintiff, occurs in chap. 9, entitled "Bonds, Bills, and Promissory Notes," and is as follows :—
"All promissory notes, bonds, due bills and other instruments in writing made by any person, whereby such person promises or agrees to pay any sum of money, or article of personal property, or any sum of money in personal property, or acknowledge any sum of money or article of personal property, to be due to any other person or persons, shall be

taken to be due and payable to the person or persons to whom the said note, bond, bill or other instrument in writing is made." It will be observed that by the wording of the section relied upon, in order to bring the claim within its provisions, it must be an instrument in writing acknowledging an indebtedness and promising payment, which may be made either in money or personal property.

Two abstracts of the record, one by each of the parties, are filed, in neither of which is there any of the evidence given showing the nature of the claim, or that there was any chose in action that had been assigned; nor is the character of the supposed claim shown by an examination of the record or disclosed in the argument, consequently we have no means of determining whether or not the claim was one made assignable by the statute. Error will not be presumed. Unless the error is shown the presumption is against it, and in favor of the regularity of the judgment. It is therefore presumable that the supposed claim was not an acknowledgment in writing of an indebtedness and a promise to pay it, upon which an action could be maintained under the statute relied upon.

Under our Code of Civil Procedure almost any surviving right of action may be assigned so as to enable the assignee to maintain a suit in his own name. By sec. 3 of the Code it is declared, "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." With proper proof, perhaps this action might have been maintained, but there was an absolute want of proof of the existence of any legal right of action, and no proof of any assignment whatever, consequently the judgment must be affirmed.

Affirmed.

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6	85

EISENHART, PLAINTIFF IN ERROR, v. ORDEAN ET AL., DEFENDANTS IN ERROR.

1. LANDLORD AND TENANT.

To render a landlord liable in an action for wrongful eviction, the acts complained of must either have been perpetrated by him, be acts for which he was personally responsible, or acts against which he had expressly covenanted.

2. LANDLORD, WHEN NOT LIABLE.

Tenants who have covenanted that they received the premises in good order and condition; that they would keep them in good repair at their own expense, and yield them up at the end of the term in as good order and condition as when entered upon,—loss by fire, inevitable accident or ordinary wear excepted,—cannot hold the landlord responsible for the results of acts of an adjoining lot owner upon his own premises.

3. TENANT, LIABILITY OF.

Under an express covenant to keep and leave the premises in repair, the tenant is bound to make good any injury from any cause not resulting from the act or neglect of the landlord.

4. EVICTION, WHAT DOES NOT CONSTITUTE.

The mere fact that the premises became uninhabitable through the act of a third person, to which the landlord has not contributed, does not amount to an eviction, or discharge the tenant from the payment of rent.

5. EVICTION—INTENTION MATERIAL.

Acts of a landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention that the tenant shall no longer continue to hold the premises.

6. EXEMPLARY DAMAGES—PRACTICE.

Where there is no evidence in the case bringing it within the statute allowing exemplary damages, it is error to submit the question to the jury.

7. EXEMPLARY DAMAGES, WHEN AWARDED.

To entitle a person to exemplary damages for a wrongful act there must be an element of fraud, malice, evil intent or oppression entering into and forming a part of the act.

Error to the District Court of Arapahoe County.

PLAINTIFF in error leased to the defendants certain premises and buildings for the term of two years from Nov. 23,

1889, at a monthly rental of \$40.00 payable in advance. Defendants were mechanics making and repairing wagons, blacksmithing, etc. A written lease was executed in the ordinary form, and defendants went into possession. Among other covenants contained in the lease defendants covenanted that they "had received the premises in good order and condition," and that they would keep the premises in good repair during the lease at their own expense. In the month of April following, defendants abandoned the premises and commenced business at another place, and instituted this suit to recover damages for alleged failure of performance of the covenants on the part of Eisenhart, and for eviction from the premises. The complaint states two counts:

First. "That the defendant, before plaintiffs went into possession, agreed to make several enumerated repairs and improvements upon the building; that he failed to perform, and that by reason of such failure plaintiffs sustained damage to stock, tools, work in process of construction, patronage and business to the extent of \$2,500."

Second. "That at different times during the month of April, 1890, defendant entered upon said premises over the protests of plaintiffs, and tore down portions of the building thereon, to which plaintiffs' machinery and appliances were attached, and entirely removed the side wall of said building, and left plaintiffs' property and business exposed, and left the roof on said building without proper support, and, against the repeated objections of plaintiffs, and over their reiterated protests, finally dug under said building until a portion of the same fell down and the floor of the same became and was unsafe, and said building was by the defendant's wrongful acts rendered dangerous to work in, and wholly unfit for plaintiffs' business, and plaintiffs were evicted by defendant from said premises and were compelled to remove from the same, and did abandon the same and give up their business thereon established on the —— day of April, 1890.

"That plaintiffs, by reason of said eviction, suffered in loss

of custom and business in the sum of \$2,000, and were put to expense in removing and seeking location elsewhere in the sum of \$500, and they therefore demand damages from defendant in this cause of action in the sum of \$2,500 and costs."

The case was tried to a jury on the second count, the court refusing to allow testimony on the first count, resulting in a judgment for plaintiffs for \$1,500.

Messrs. STEVENS & WARD and Mr. ETHELBERT WARD, for plaintiff in error.

Mr. T. B. STUART, Mr. C. A. MURRAY and Mr. A. M. ANDREWS, for defendants in error.

REED, J., delivered the opinion of the court.

Many supposed errors are assigned, several of which I shall not find it necessary to notice. It is urged that many errors occurred in admitting and rejecting evidence. The contention appears to be well founded. The transcript from end to end bristles with the objections and exceptions of the defendant. It would be impossible, or at least impracticable, to point them all out. It must suffice to say that during the entire trial successful efforts were made to put in evidence of failure to repair and make improvements as alleged in the first count. Plaintiffs succeeded admirably in making a case in support of the first count, notwithstanding the ruling of the court that no evidence would be received.

In the second count of the complaint the supposed eviction is alleged to have occurred in April. Upon the trial it appeared by the evidence of the plaintiff, Eitel, that they made no repairs, and that in February and March they were looking for other quarters with a view to moving.

"Q. Did you not go to Mr. Hall and speak to him about getting a building from him? A. Yes, sir, *for the reason that the building was not in shape.*

“Q. Just as soon as you got a chance you were going to leave? A. Yes.

“Q. Paid \$40.00 a month? A. Yes, sir, and mighty sorry for it.”

(Redirect examination.) “Q. When did you first make inquiries about a new location? A. Some time in February or March.

“Q. State to the jury why you made these inquiries? A. Because the building was not put in shape, according to agreement.

“Q. What did it lack? A. It lacked shutting up the cracks in the back and keeping the dust out, and the leaks in the front room where it leaked in the roof.

“Q. Anything else? A. Had no back door so we could pull a wagon through. He had put something there, but it was worse than before on account of the dust.”

To this testimony objections were made and exceptions saved.

It also appears that notwithstanding the covenants in the lease, on the 15th of February, plaintiffs made a written demand of the defendant, requiring him to make different, specified repairs upon the building. Such writing was offered in evidence and was admitted. The defendant afterward offered proof that he had in every respect complied with the demand, and the court refused to admit it. All this irregular and inadmissible testimony, which could only have been allowed, if at all, on the first count, could not fail to influence the jury and prejudice the defendant. It also plainly appears that the plaintiffs were seeking an excuse for leaving and an opportunity. This will become pertinent in considering the trial of the case on the second count.

The alleged eviction for which judgment was obtained was caused, if at all, by the owner of the adjoining lot—not by any acts of the defendant; they were, as far as he was concerned, entirely beyond his control. The wall of the leased building was on the line of the adjoining lot, on which the owner entered and excavated to erect a building. It

first became necessary to shore up the wall of the building in question, which was promptly and properly done by the defendant. It then became apparent that the wall would have to be removed. The defendant immediately put in a temporary wooden wall with as little inconvenience as possible to the tenants, and assisted in handling and adjusting their property in the shop. While the excavation was being continued, during a severe storm, a part of a side wall of the rear building, some four feet from the line, by the caving of the bank, fell into the excavation. This damage, as shown by the evidence, was as speedily as possible repaired by the defendant. At this point the plaintiffs abandoned the premises. Upon the trial much incompetent testimony of actual damage was admitted; some of it in regard to the business before and subsequent to the removal, which should not have been allowed. In regard to loss of stock, injury, expense of moving, etc., the testimony was vague and indeterminate, leaving it impossible for any jury to arrive at any satisfactory conclusion. Even if the defendant was chargeable for the same, taking the largest estimate of plaintiffs in regard to the actual damage sustained, it was but a trifle compared with the amount of the verdict, showing clearly that the jury awarded exemplary or punitive damages.

The first question to be determined is: Did the acts of the landlord amount to eviction of the tenants? To render the landlord liable, the acts must either have been perpetrated by him or be acts for which he was personally responsible, or acts against which he had expressly covenanted. He was not responsible for the acts of an adjoining lot owner on his own premises. They were entirely beyond his control, and acts against which he had not covenanted, and if the acts of the adjoining owner resulted in the destruction of the building, compelling removal, it is very doubtful if any action could be maintained upon any covenant in the lease, except that of peaceable possession for the time the property was leased, and the damage could only have been the actual damage sustained, perhaps, the cost and incidental trouble of mov-

ing, and the balance of the lease for the unexpired term,—in other words, the value of the use in the market, over and above the rent covenanted to be paid. See 3 Suth. on Dam. 149, and cases cited; Taylor's Land. & Ten. (8th ed.) § 317; *Green v. Williams*, 45 Ill. 206; *Mack v. Putchin*, 42 N. Y. 167; *Rhodes v. Baird*, 16 Ohio St. 573.

What were the undisputed facts in regard to the falling of the second wall? The excavation of the other party was four feet from it. There came a severe storm in the night; the earth caved, and the wall fell. An injury resulting from no acts of the defendant, not foreseen or contemplated by him or his tenants. It was claimed that by such accident the greater part of the actual loss was sustained. The stock was injured by the elements, and proof was allowed of each item to charge the defendant. This was clearly erroneous. Such injuries were not the result of any act of his, nor through his agency, nor the result of any negligence. The evidence shows that defendant repaired the breach at the earliest practicable hour. The eviction, if there was one, to render the defendant liable, must have been caused by him. Plaintiffs covenanted that they would "keep said premises in good repair during the lease at their own expense; that they had received the premises in good order and condition, and at the expiration of the time of this lease above mentioned they will yield up the said premises to the said party of the first part in as good order and condition as when the same were entered upon * * * loss by fire or inevitable accident or ordinary wear excepted."

Under a lease containing identical covenants in *Kramer v. Cook*, 7 Gray (Mass.), 550, the defendants (lessees) attempted to prove that the premises had become unsafe and untenable by reason of the undermining and settling of the partition wall by the owner of the adjoining lot, and the court held the evidence properly excluded. It is said:—"The landlord is not ordinarily bound to keep the premises in repair; nor is there anything in the lease to create such duty." Then, after citing covenants identical with those

contained in this lease, proceeds, "the falling of the wall by reason of not being properly shored up would not seem to be an unavoidable casualty. *The duty of repair would be on the lessee and not the lessor.*" Also, under the covenants, it was held not only that the landlord was not chargeable, but that, "under the provisions of the lease, there would be no abatement or suspension of rent because of such injury to the premises." See also to same point:—*Fowler v. Bott*, 6 Mass. 63; *Phillips v. Stevens*, 16 Mass. 238; *Jaques v. Gould*, 4 Cush. 384; *Bigelow v. Collamore*, 5 Cush. 226.

"Under an express covenant to keep and leave the premises in repair, the lessee is bound to make good any injury from any cause not resulting from the act or neglect of the landlord." 1 Wood's Land. & Ten. (2d ed.) 795; *Phillips v. Stevens* (*supra*); *Allen v. Howe*, 103 Mass. 241; *Hallett v. Wylie*, 3 John. (N. Y.) 44; *Wiegall v. Waters*, 6 Term Rep. 230; *Green v. Eales*, 2 C. B. 225.

In order to work a legal eviction, "the act complained of must proceed from the landlord himself or some person acting under his authority, or by or through him." Wood's Land. & Ten. (2d ed.) 1098; *Dewitt v. Pierson*, 112 Mass. 8; *Gilhooley v. Washington*, 4 N. Y. 217.

"The mere fact that the premises became uninhabitable through the act of a third person to which the landlord has not contributed, does not amount to an eviction."

"The removal of a party wall by an adjoining owner, whereby the building is made untenable, does not operate as an eviction, which discharges the tenant from the payment of rent." *Barns v. Wilson*, 8 Centl. Rep. (Pa.) 454; *Carson v. Codley*, 26 Pa. St. 117; *Hazlett v. Powell*, 30 Pa. St. 293.

Nor does it violate the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Dobbins v. Brown*, 12 Pa. St. 75; *Moore v. Weber*, 71 Pa. St. 429; *Ramsey v. Wilkie*, 13 N. Y. Sup. 554.

In *Morris v. Tillson*, 81 Ill. 607, it is said: "The intention is material. Acts of a landlord in interference with the tenant's possession, to constitute an eviction, *must clearly indi-*

cate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises." See also *Upton v. Townsend*, 17 C. B. 30.

Under the authorities cited, to which if necessary a large number might be added, it is clear from all the evidence in the case that there was no eviction. The injuries sustained were those which lessees were bound to repair under the covenants. It is shown that the landlord voluntarily assumed the repairs for the benefit of his tenants. So far from his conduct evincing a desire to evict, it conclusively shows his desire and efforts to retain them, and, as above shown, the tenants, long prior to the alleged eviction, were seeking other quarters and an opportunity to abandon the premises. It at once becomes apparent that they gladly availed themselves of the first circumstances that offered any supposed justification.

In 2 Wood's Land. & Ten. (2d ed.) 1107, it is said: "The tenant must not only abandon the premises, but it must also appear *that he abandoned them on account of the acts of the landlord, which are claimed to operate as an eviction*; and if his abandonment was due to other causes, in part even, he cannot set up such acts to an action for the rent." See *Edwards v. Candy*, 14 Hun, N. Y. 576; *Edgerton v. Page*, 20 N. Y. 281; *Myers v. Burns*, 35 N. Y. 269.

The verdict was so disproportionate to any damage proved, it is at once apparent that much the greater portion was allowed as exemplary or punitive damage.

The statute permitting in any civil case exemplary damage is: Sec. 1, Acts 1889, p. 64, as follows: "That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." There was no evidence whatever in the case bringing it within

the provisions of the statute—nothing upon which the jury could act; hence, to submit to the jury in the instructions the question, and allow it arbitrarily to evolve or assume wrongful acts and award exemplary damage was error. “Whether there is any evidence to justify the finding of exemplary damages, is a question for the court. If there is none, it is error to submit the question to the jury.” 1 Sedg. on Dam. (3d ed.) § 387; *Rose v. Story*, 1 Pa. St. 190; *Amer v. Longstreth*, 10 Pa. St. 145; *Pittsburgh R. S. Co. v. Taylor*, 104 Pa. St. 306; *Selden v. Cushman*, 20 Cal. 56.

“To entitle a person to punitive damages for a wrongful act there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the act.” *Phila. R. Co. v. Hoeflich*, 62 Md. 300. The same in principle is the language of our statute. See, also, *Ross v. Leggett*, 61 Mich. 445; *Mattice v Brinkman*, 74 Mich. 705; *Schippel v. Norton*, 38 Kans. 567; *Wentworth v. Blackman*, 71 Iowa, 255.

The jury was, evidently, misled as to the issues involved by the unwarranted admission of evidence in regard to repairs, or as to the law of the case by the instructions of the court, which, as shown above, were in one important particular erroneous and to some extent contradictory and incompatible. Such being the case the judgment must be reversed and the cause remanded.

Reversed.

3	170
4	479
3	170
8	49
8	255

BRIGHT, APPELLANT, v. THE FARMERS' HIGHLINE CANAL
& RESERVOIR COMPANY ET AL., APPELLEES.

1. MANDAMUS.

Mandamus is a purely legal, civil proceeding,—no element of equity or application of equitable law is or can be involved.

2. SAME.

The writ of mandamus runs to an inferior tribunal, board, corporation

or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.

3. SAME.

The right to the writ must be clear and unquestionable and the performance of the duty specifically imposed. It does not lie to enforce private contracts.

4. JURISDICTION—MANDAMUS—EQUITY.

The court below was without jurisdiction in an application for mandamus, to hear and determine the equities between the petitioner and an intervenor, even by request and agreement of the parties.

Appeal from the District Court of Jefferson County.

AN application for a mandamus brought by the appellant as petitioner against The Farmers' Highline Canal & Reservoir Company, as respondent, to compel it to sell and deliver to the petitioner seventy inches of water from the ditch, to be by him used in irrigating an eighty-acre tract of land occupied as a farm. It appears that petitioner commenced to occupy the land in 1872. In 1873, he purchased from the original company, owning and operating the same ditch, seventy-five inches of water, and annually purchased the same quantity until 1882, when he voluntarily reduced the quantity to seventy inches, which he continued to purchase annually until 1889. From 1885 to 1889, inclusive, he was farming upon a portion of sec. 36, school land, which he had bought. This land, as well as the home eighty acres, was irrigated by the same water—seventy inches—part being used on each tract. Some time in 1888, petitioner advertised the land on the school section for sale, and in such advertisement occurs the following:—"Two-thirds under ditch, water right, besides living water." The only water right was that part of the seventy inches used by the petitioner. An agent applied to the petitioner to get the sale of the land, and was informed by the petitioner that thirty of the seventy inches which he purchased, and to which he was entitled from the ditch company, went with the land. The negotiations resulted in a sale of the land. The Hackberry Tree, Land and Stock Company became the owner from the purchaser. No water, or right to purchase water, was conveyed. The right of the purchaser company resting upon the application of

of the purchaser company resting upon the application of the water by the grantor for five years to the land sold, and his parol statements in the advertisement, and to the agent who made the sale, that thirty inches of water went with it. In the ensuing spring, petitioner demanded from the respondent the entire seventy inches of water for use upon his original eighty acres, and tendered payment for it. The Hackberry Company demanded the thirty inches for use upon the land purchased. Appellant (petitioner) filed his suit for a mandamus to compel the sale to him of the entire quantity, relying upon his former use and alleged prescriptive right to the same. The respondent answered, denying some of the allegations in the petition, setting up the facts above stated, and the claim and demand of both parties to the water in controversy, and avowing its willingness to deliver the water to either when the legal right should be established. It denied the allegation in the petition that the entire seventy inches of water was necessary to irrigate the eighty acres of the petitioner, and alleged that forty inches was all that was necessary to properly irrigate it. The respondent further, by its answer, or in the nature of a cross complaint, asked:—"That the rights and priorities of the said petitioner and the said company in and to the said thirty inches of water, being a part of the seventy inches of water mentioned in the petition therein, may be heard, adjudged and determined, and that the said The Hackberry Tree, Land, Reservoir and Stock Company may be adjudged to be entitled to the same, and for such other further and different relief as may be just and proper, and for its costs."

On the 11th of November, 1891, The Hackberry Company applied to be made a party, and by the court was allowed to intervene and become a defendant. It filed an answer and cross complaint in its own behalf nearly identical with that of the respondent. The petitioner replied to the answers and cross complaints of the respective defendants. A trial was had to the court; a large amount of testimony was heard. The finding and judgment of the court was as follows:—

"Doth find for the intervening defendant as against the

plaintiff, and doth find that the said The Hackberry Tree, Land, Reservoir & Stock Company, intervening defendant, is entitled to receive from the defendant, The Farmers' High-line Canal and Reservoir Company, as against the plaintiff, the thirty inches of water for irrigation purposes, being a part of the seventy inches of water for which this action is brought, and which is claimed by the plaintiff herein; and doth further find that the right to the same was sold and conveyed by said plaintiff to the intervening defendant, and that by his conduct the plaintiff is estopped from claiming the same as against the intervening defendant, and that the plaintiff is not entitled to the same or to demand or receive the same from the defendant, and doth order judgment to be entered accordingly.

“Wherefore it is ordered, adjudged and decreed, and the court doth order, adjudge and decree, that the plaintiff's petition herein be denied, and that as to the plaintiff the said defendant go hence without day, and do have and recover of and from the said plaintiff its costs in its behalf, laid out and expended, to be taxed, and do have execution therefor; to which finding and decision the plaintiff, by his counsel, duly excepted.

“And it is further ordered, adjudged and decreed, and the court doth further order, adjudge and decree, that the prayer of the intervening defendant be granted; and that the said intervening defendant is entitled, as against the plaintiff herein, to the right to ask, demand and receive of and from the defendant herein the thirty inches of water for irrigating purposes, and being a part of the seventy inches of water for which this action was brought; and the said plaintiff is not entitled to receive said thirty inches of water or any part thereof; and that the said intervening defendant do have and recover of and from the said plaintiff its costs in its behalf, laid out and expended, and do have execution therefor,” from which an appeal was taken to this court.

Mr. E. KEELER and Mr. H. N. SALES, for appellant.

Mr. J. W. HORNER and Mr. J. E. ROBINSON, for appellees.

REED, J., delivered the opinion of the court.

The proceeding was an application for a mandamus to compel the defendant corporation to deliver to the petitioner seventy inches of water to irrigate his tract of eighty acres. His right to it is predicated upon prescription or a supposed statutory prescriptive right by reason of formerly having for a number of years purchased and received that quantity. To enforce this supposed right application was made for the writ. The action or proceeding appears to have been misunderstood by the court and counsel. The proceeding by mandamus is a purely legal, civil proceeding; no element of equity or application of equitable law is or can be involved. It is "directed to any person, corporation or inferior court of judicature * * * requiring them to do some particular thing, therein specified, *which pertains to their office or duty.*" 3 Blacks. Com. 110. "Is directed to some person, corporation or inferior court requiring them to do some particular thing therein specified, *which appertains to their office or duty, and which is supposed to be consonant with right and justice, and when there is no other adequate remedy at law.*" *Kendall v. United States*, 12 Pet. 524.

In *Rex v. Barker*, 3 Burr. 1265, Lord Mansfield said:—"Where there is a right to execute an office, perform a service or a function or exercise a franchise (more especially if it be a matter of public concern or attended with profit) and a person is kept out of possession or dispossessed of such right, and has no other specific, legal remedy, this court ought to assist by a mandamus upon reasons of justice, as the writ expresses, and upon reasons of public policy to preserve peace, order and good government."

The general statutory definition in the United States is: "*That the writ runs to an inferior tribunal, board, corporation or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or sta-*

tion." See *Boggs v. C. B. & Q. R. R.*, 54 Iowa, 435; *Fremont v. Crippen*, 10 Cal. 211; *State v. Gracey*, 11 Nev. 223.

"The writ only lies to enforce duties imposed by law, and neither stipulation nor the agreement of the parties can change the uses or the extent of the writ of mandamus." The legal right to the writ must be clear and unquestionable, and the performance of the duty specifically imposed. See *Freon v. Carriage Co.*, 42 Ohio St. 30; *People v. Green*, 64 N. Y. 499; *Mobile & O. R. R. v. Wisdom*, 5 Heisk. (Tenn.) 125.

It will not lie to enforce private contracts. *Benson v. Paull*, 6 Fl. & Bl. 273; *State v. Bridge Co.*, 20 Kans. 404; *People v. Dulany*, 96 Ill. 503; *Tobey v. Hakes*, 54 Conn. 274.

"It is considered to be a harsh remedy, and to be substituted for the ordinary process only in extraordinary cases." *State v. New Orleans R. Co.*, 42 La. An. 138.

The writ has always been kept within its own narrow limits, and the courts have universally been unwilling to extend its operation. *Blair v. Marye*, 80 Va. 485; *State v. Young*, 38 La. An. 923.

It will readily be seen that the respondent in its answer and what may be regarded as a cross complaint in setting up the supposed equitable rights of the Hackberry Company, and praying that it be decreed to be the owner of the water in controversy, exceeded the limits of the defense allowed by law, and that part should have been disregarded or stricken out. Nor could the court, even by request and agreement of parties, change an arbitrary legal proceeding brought to enforce a specific duty into a suit in equity, and adjudicate the equities between the petitioner and the intervenor. Such equities can only be adjusted by the proper proceeding instituted by one of the contending parties.

So far as the answer of the respondent, by the allegations contained, sets up facts showing it was not legally, nor in the performance of a specific duty, obliged to deliver the water, or in other words, in so far as it set up the facts to defeat the issuance of the writ, was proper, and the issues thus formed were competent to be tried. The evidence shows that

the petitioner formerly claimed and bought seventy-five inches of water for the eighty-acre tract; that he afterwards voluntarily reduced it to seventy inches; that for some years he took that quantity; that he then bought land on the school section, and applied water to that for five years. / These facts show, conclusively, when taken in connection with nearly all the testimony, that the water was not all needed for the eighty-acre tract, that forty inches was an adequate supply, as much as was sold by the respondent and used by other consumers, generally, in the vicinity. His supposed prescriptive right was neutralized or destroyed by his five years' application of the water to other lands. The most he could lawfully claim was an adequate supply. / The administration of a franchise like that of respondent requires absolute impartiality when there are no fixed legal priorities; hence, the court was warranted in finding that the petitioner had no fixed legal prior right to seventy inches of water; that for the entire neighborhood one half inch to the acre was deemed sufficient and was all adjoining landowners claimed or received, and that the further fact that he for five years applied the water successfully to his original farm and the school land was conclusive that it was in excess of his home needs. / The court was warranted, therefore, from the premises, in finding that the respondent was not legally compelled to furnish the amount of water demanded, and the petitioner was not entitled to the writ. That part of the finding must be affirmed. With such finding, on application for a writ of mandamus, the power of the court was exhausted. It was without jurisdiction to hear and determine the respective rights of petitioner and intervenor.

The balance of the finding and judgment wherein the intervenor is decreed entitled to the water as against the petitioner and respondent is reversed and held for naught, being in excess of the authority of the court.

The judgment denying the writ of mandamus is affirmed.

Balance reversed..

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY
OF LARIMER, APPELLANT, v. LEE, APPELLEE.

3	177
3	497
3	177
6	71
8	177
18	62

1. EXPERT WITNESSES—FEES.

A physician who attends as a witness in obedience to a subpoena may be compelled to express his opinions on hypothetical questions, or on general medical and toxicological subjects, as an ordinary witness is compelled to testify on questions of fact within his knowledge, and for the same statutory fees.

2. SAME.

An expert cannot be compelled to do a particular thing, as to analyze the contents of a stomach, or perform a *post mortem* operation, by the ordinary process of subpoena, nor for an ordinary witness fee.

3. COSTS.

Costs were not allowed at common law, and are taxable only by force of the statute.

4. EXTRA COMPENSATION, NO JURISDICTION TO ALLOW.

The district court has no inherent or other power to allow compensation in excess of the statutory fees to experts to be called as witnesses in a criminal case. Such an order is not binding upon the county chargeable with the costs.

5. COUNTY FUNDS, BY WHOM DISBURSED.

The board of county commissioners alone have the right to disburse county funds, and to decide in what cases and under what circumstances they should be paid out, unless it be in those cases where fixed rights are conferred by statute.

Appeal from the District Court of Larimer County.

Messrs. ROBINSON & LOVE, for appellant.

Mr. E. A. BALLARD, for appellee.

BISSELL, J., delivered the opinion of the court.

This case is the outgrowth of that cause *celebre* known as the Millington case. The Millingtons were indicted for the murder of one Avery by the administration of poison. To determine the effects of certain poisons, the symptoms by which they were manifested, and their resultant operations

on the physical system, necessarily became, an important subject of inquiry on the trial. It is impossible to ascertain from the present record exactly when, or under what circumstances, the appellee, Lee, was called as a witness, but it is easily gathered from the agreed state of facts on which the case was tried that, at some time during the progress of the trial, the district attorney applied to the court for an order to subpoena thirteen persons as expert witnesses to testify on these medical and toxicological questions. The witnesses were not subpoenaed, put on the stand or asked to testify prior to the time the order was made. They came in obedience to the subpoenas, and in evident reliance upon the validity of the order voluntarily gave evidence touching the matters about which they were interrogated. They did not insist that their fees should be paid before testifying, nor did they refuse to testify on the ground that their professional opinions could not be sought without additional compensation. These latter distinctions are expressed to illustrate in the subsequent discussion the difference between the present case and the authorities relied upon by Lee to support his action. When the trial was concluded, Lee presented his claim to the board of county commissioners of Larimer county for fees at the rate of twenty-five (\$25.00) dollars per day for thirteen days, and twenty cents per mile for seventy-five miles of travel. The board refused to allow this claim as presented, but did audit it at the sum of one dollar and fifty (\$1.50) cents per day, and mileage at ten cents per mile, which are the rates and costs fixed by statute as the compensation of an ordinary witness attending a criminal trial. Thereafter, by regular statutory proceedings, the matter came before the district court for adjudication, and that court decided that the judge presiding over the trial of the Millington case had power to make the order allowing these expert witnesses additional compensation, and rendered judgment against the county for the amount which Lee claimed. The board brings the case here, and insists that no cause of ac-

tion came to plaintiff for his extraordinary compensation by reason of the order.

The question presented is one of first impression in this state. The subject has received judicial consideration in other tribunals, and the authorities are not uniform on the subject. Wherever the matter has been presented, it has come up under circumstances which show that the witness when subpoenaed refused to testify until his expert fees had been paid. The courts have then considered the question in the light of the right of a witness to refuse to express his professional opinions before he is paid an additional and greater compensation than that fixed by the statute as the pay of the ordinary witness, who testifies as to facts. This circumstance may possibly make no difference in the application of the rule, which will be announced; but it presents undoubtedly a very palpable distinction between those cases and the one at bar. The authorities which adjudge additional compensation to be the right of the expert, and which assert his privilege to refuse to testify until paid, are not in harmony as to the basis on which their conclusions are rested. Some declare that he is entitled to the extra pay because his professional opinions are his own property, which cannot be extracted from him except for an honorarium, which shall be satisfactory to the witness; and others, on the ground that the time of a professional witness called as such has a value beyond that of a witness who is called to testify to a fact regardless of his business or his status.

The line of authorities adjudging the contrary are on reason and principle much more satisfactory, and would undoubtedly be followed by this court were the question presented under the identical aspect exhibited in those decisions. They hold that when a professional witness attends in obedience to an ordinary subpoena, he may be compelled to express his opinions on hypothetical questions, or on general medical and toxicological subjects, as an ordinary witness is compelled to testify on questions of fact within his knowledge and for the same statutory fees. The authorities un-

doubtedly concede, as does this court, that if the witness be legally required to do any particular thing, as to analyze the contents of a stomach, or perform a *post mortem* operation—in these and similar cases, such services cannot be compelled by the ordinary process of subpoena, or the labor required by the payment of an ordinary witness fee. These exceptions, however, do not modify the general rule that the professional witness in the discharge of his duty as a good citizen is like any other person, whether he be laborer, merchant, broker, manufacturer or banker, compellable to attend in obedience to process, and to testify as to what he may know, whether it be observed facts, or accumulated knowledge acquired by study and experience. The rule is a sound one and commends itself to our judgment. It is apparently nothing but a question of relative value, and it frequently happens that the loss of time is a less serious one to the professional witness than to the person engaged in the more active business walks of life. *Summers v. The State*, 5 Texas Court of Appeals, 365; *Ex parte Dement*, 53 Ala. 389; *State v. Teipner*, 36 Minn. 535.

These conclusions do not entirely dispose of the present controversy. It still remains to be decided whether the court making the order, under the circumstances indicated, possessed the power to bind the county of Larimer to the payment of the fees expressed in the mandate.

It is a matter of common learning that costs are a creature of statute. In ancient times, neither in civil nor in criminal cases, did the plaintiff or the state have judgment for anything in the nature of costs. As Sir Edward Coke says in 2 Inst. 288, speaking of the statute of Gloucester, 6 Edw. 1:—"Before this statute, at the common law, no man recovered costs of sute, either in plea real, personall, or mixt; by this it may be collected that justice was good cheap of auncient times, for in King Alfred's time there were no writs of grace, but all writs remedialls were graunted freely." *County of Franklin v. Conrad*, 36 Pa. State, 317; *Haynes v. Mosher*, 15 Howard Pr. 216; *Faulkner v. Handy*, 79 Cal. 265; *Mark et*

al. v. The City et al., 87 New York, 184; *Pugh v. Good*, 13 Ore. 85; *Person v. Ozark Co.*, 82 Mo. 491; *Noyes v. The State*, 46 Wis. 250.

The recovery cannot be supported by express legislative enactment, for none has ever been incorporated into the law of the state. In some states, notably Indiana and Iowa, where a similar controversy had arisen, the legislature remedied the difficulty and enacted a statute, granting to the judge who might preside at the trial power to allow to expert witnesses such additional compensation as, in his judgment, might seem reasonable. We gather from this fact, as well as from the character of the reasoning of the courts holding the other doctrine, that it was never a question entirely free from obscurity. It therefore follows that unless the court possessed the inherent power to enter an order of this description, it was without jurisdiction for the purpose, and the entry could give to the appellee, Lee, no right of action against the county. Nothing but an evident and an unavoidable necessity should lead to the conclusion that any such power is vested in the court. It is wholly unessential to the safe or successful administration of justice. Power to enforce the attendance of witnesses, and authority to compel them to testify to whatever they may know will, in the light of judicial experience, always suffice to conserve the purposes of justice. Wherever extraordinary expenditures seem prudent, necessary or indispensable, the legislature has clothed another and independent body with broad and ample authority to do whatever ought to be done. Under the statutory plan which divides the state into counties, and regulates the government of those territorial subdivisions, all power to fix, control, determine or in any manner dispose of the funds of a county is devolved on the board of county commissioners. They alone have the right to disburse the public moneys, and to decide in what cases, and under what circumstances, such funds shall be paid out, unless it be in those cases where fixed rights are conferred by statute. In and of itself, this fact should be decisive of the present in-

quiry. Wherever a broad, universal and sweeping power is thus given to a governing body, it cannot be conceded that by implication any other body, whether it be a court or one resembling the board of county commissioners should likewise have power to dispose of the public revenues. Under some circumstances, it might be very strongly argued that this power should be decided to be inherent in the court, since otherwise there is liable to be a manifest failure and miscarriage of justice, springing from the prejudices which may infect the people of a county, or coming from an unusually economical and parsimonious board, which would prefer to see crime unpunished rather than the public revenues wasted. The present case, however, does not come with any such argumentative or possible exception. It is enough at present to say that the record does not show that there was any application to the board of county commissioners to contract with the witnesses, or to authorize the expenditure of the money. The application to the court was not based upon such facts, coupled with the showing that justice would manifestly miscarry if the order was not made. We, therefore, hold that, in a case like the present, the court was entirely without power to make an order which should bind the county, and give to the witness a cause of action for this extraordinary compensation. Since he is unable to point to any statute which gives him such fees, he must be satisfied with the compensation which the statute specifies, whether it be mileage or *per diem*.

The judgment which the court entered in favor of the appellee, Lee, for twenty-five (\$25.00) dollars per day and twenty cents for mileage is erroneous and must be reversed.

Reversed.

THORNE ET AL., APPELLANTS, v. THE SCHUMAKER PIANO
COMPANY, APPELLEE.

APPELLATE PRACTICE.

Where the evidence supports the judgment, it will not be disturbed, because the proofs are conflicting, or a different conclusion might have been reached.

Appeal from the District Court of Arapahoe County.

Messrs. ROSS & DEWEESE, for appellants.

Messrs. NORRIS & HOWARD, for appellee.

BISSELL, J., delivered the opinion of the court.

After a somewhat extensive correspondence The Schumaker Piano Company shipped two pianos from their sales-rooms in Philadelphia to themselves as consignees. When the terms and conditions of the transfer to the appellants, Thorne & Griff, were completed, they received the firm acceptances at four months from the 21st of August, 1889, and indorsed the bill of lading over to them. Thorne & Griff received the pianos. About the time of the maturity of the acceptances the company became satisfied that Thorne & Griff had obtained the pianos by misrepresentations which entitled the vendors to rescind the sale. The corporation brought this suit on that basis, and by apt averments charged that the defendants represented themselves as intending and desirous to assume the agency for the piano in Denver, and held themselves out as persons competent to influence and procure a very considerable trade for such instruments. It would subserve no useful purpose to state the substance of the complaint, or the contention of the parties, other than to state in general that the dispute between the parties springs from the company's assertions in respect of this

matter on the one side, and Thorne & Griff's denials on the other. The complaint was sufficient in substance and in form, and if it has been sustained by adequate and competent proof, warrants the judgment which the court rendered.

The law applicable to the controversy is not challenged by the appellants. It is conceded that, if the evidence supports the judgment and is ample for the purpose, the law justifies the recovery. The only question thus really left for the court to pass on is whether the case comes, by reason of the absolute insufficiency of the proof, within the rule so long established in this state. At the outset it may be premised that it is exceedingly doubtful whether any question concerning the admissibility of testimony has been saved by a sufficient objection to warrant its consideration. Whatever might be the conclusion on that question, the court committed no error in refusing testimony offered on behalf of the defendants, and its interlocutory disposition of questions of evidence infringed no established rules. In the direct conflict presented by the proof, it would be entirely easy to suggest many reasons and arguments in support of a different conclusion from that reached by the court, and equally possible to present cogent ones supporting its judgment. This being true, and there being evidence on which the case can properly rest, we are not at liberty to disturb the judgment. There is no such complete want of testimony to support it as will warrant this court in reviewing the conclusions arrived at by the trial judge.

This disposes of all the considerations urged by counsel in their brief, and since they point to no error committed in the trial of the case the judgment will be affirmed.

Affirmed.

AMTER, APPELLANT, v. CONLON, APPELLEE.

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1. APPELLATE PRACTICE.

There are few exceptions to the general rule that appellate tribunals will not disturb judgments because of the insufficiency of proof, where they rest upon conflicting testimony and there is enough in the record to support the conclusion.

2. PLEADING—QUIETING TITLE.

It is not incumbent upon the plaintiff in an action to quiet title to set forth in the complaint the claim or estate asserted by the defendant, the nature of the claim, or the facts which demonstrate its invalidity.

3. SAME.

An allegation in such a complaint that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate and interest which he claims.

Appeal from the District Court of Arapahoe County.

Messrs. SULLIVAN & MAY, for appellant.

Messrs. COE & FREEMAN, for appellee.

BISSELL, J., delivered the opinion of the court.

This litigation sprung out of the attempt by Marks Amter, the appellant, to subject certain real property which stood in the name of the appellee, Mrs. Conlon, and of which she claimed to be the owner, to the payment of a judgment which Amter had recovered against Daniel Conlon, the appellee's husband. Counsel suggest but two considerations in support of their contention that the judgment should be reversed. One rests solely upon the insufficiency of the complaint, and the other on the inadequateness of the testimony to support it. This removes the necessity otherwise than in the briefest manner to state the case made by the record. In March, 1889, Mrs. Conlon was the grantee by deed from the then owner of the premises which are the subject-matter of the

suit. Subsequently, Amter recovered a judgment against Daniel Conlon, indemnified the sheriff, caused his execution to be levied on the property, had it sold, and became the purchaser. To remove the apparent cloud upon her title, Mrs. Conlon brought this action against Amter and substantially stated: That she held the fee simple title, that the defendant claimed an interest and an estate in it adverse to her, and alleged that his claim was without right, and that he was without estate or interest. Her complaint closed with the usual and requisite prayer. The defendant demurred on the general ground of insufficiency. When this demurrer was overruled he answered, setting up the recovery of his judgment, the levy of the execution and sale of the property, and averred that Daniel, the husband, was really the owner of the estate, and that the title was taken in Mrs. Conlon's name to hinder and delay his creditors. This statement is sufficient to indicate the points made, and the basis of the decision. With reference to the error based on the inadequacy of the proof to support the decree, it is enough to say that with this contention we have no concern. There is enough evidence in the record to support the finding of the court, and to justify the decree. There are very few exceptions to the general rule, that appellate tribunals will not disturb judgments because of the insufficiency of the proof, where the decree rests upon conflicting testimony, and there is enough in the record to support the conclusion.

There is little more trouble with the second proposition. Under our statute an action may be brought by any person in possession against another who claims an estate therein adverse to him. The appellant contends that, to entitle a plaintiff to maintain an action under this statute, it is incumbent on him to set forth in his complaint the claim, or the estate asserted by the defendant, and to show by proper averments, not only the nature of that claim, but the facts which demonstrate its invalidity. Some of the earlier decisions doubtless held this to be the rule, and required the pleader, as in ordinary equitable actions, to set out what the estate

was, and what the defendant's claims might be. The later authorities, which seem to have more carefully regarded the intent and the purpose of the statute, have adjudged these allegations to be totally unnecessary. A complaint almost identical in form, and certainly identical in substance, has been sustained by several well considered cases. In the case of *Ely v. R. R. Company*, cited below, the court said: "An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee is sufficient, without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate and interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff." This decision accords with the intent and purpose of the act which is to compel the defendant to make a showing of the title which he asserts, and enable the plaintiff, while the evidence is still in existence, to establish the validity of his title, and free it from the apparent cloud which the defendant claims covers it. *Ely v. New Mexico & Arizona R. R. Co.*, 129 U. S. 291; *The Scorpion Silver Mining Co. v. Marsano*, 10 Nev. 370; *Rough v. Simmons*, 65 Cal. 227.

The judgment cannot be disturbed for lack of proof, and the complaint stated a cause of action.

The contention in respect of these matters not being well founded, and no other error being called to the attention of the court, the judgment will be affirmed.

Affirmed.

KEATOR ET AL., PLAINTIFFS IN ERROR, v. THE COLORADO COAL AND IRON DEVELOPMENT COMPANY, DEFENDANT IN ERROR.

1. STIPULATION—PRACTICE.

The agreed statement upon which the cause was submitted contained a copy of a contract which lacked sundry indorsements on the original. It was agreed that "when said contract is obtained, any and all indorsements, writings, figures, etc., thereon, shall be copied on the back of Exhibit A and become a part thereof." When the original was produced there appeared on its face the words, "Canceled by substitution of deed to property," and the defendants asked leave to so change what purported to be a copy as to make it conform to the original. Held, leave should have been granted.

2. MERGER OF EXECUTORY CONTRACT.

An executory agreement for the sale of land is annulled and abrogated by the delivery and acceptance of a deed in pursuance thereof. It can no longer be resorted to for the purpose of ascertaining the terms on which the land was sold, unless it is shown by otherwise competent testimony that something remained to be done after the transfer of the title.

3. TAXES, AS BETWEEN GRANTOR AND GRANTEE.

The statute provides that as to all lands conveyed between the first day of January and the first day of May, the grantee must, in the absence of express agreement, pay the taxes which stand assessed against the property. A payment of such taxes by the grantor, under such circumstances, gives no right of action against the grantee.

Error to the County Court of Pueblo County.

Mr. D. MCCASKILL and Mr. J. E. RIZER, for plaintiffs in error.

No appearance for defendant in error.

BISSELL, J., delivered the opinion of the court.

If the evidence produced on the trial were conceded to be admissible it would not support the judgment entered. The

action was brought by the Colorado Coal & Iron Company against the plaintiffs in error, Keator, Barclay and Townsend, to recover \$64.12 which the company had paid as taxes on certain lots in Pueblo, which had been sold to those parties prior to the payment and the suit. When the cause was tried in the justice's court, it was submitted on an agreed statement of facts under a stipulation that the statement should be all of the evidence used during that or any succeeding trial of the case. A copy of the original agreement of sale was incorporated into the stipulation, under a proviso that it might be changed to conform to the original when that should be produced. To render the decision and the controversy intelligible the agreed statement of facts must be summarized, though much of it would have been inadmissible as evidence had it been objected to in a proper and timely manner. From this statement it appears that in July, 1889, the company contracted to sell to Keator and his codefendants three lots in the town of Pueblo. The consideration was \$1,435, represented by certain promissory notes payable at fixed dates, and "the further payment of all taxes hereafter levied on said premises." The company agreed, on the payment of the expressed consideration, to execute a deed for the premises. It is recited that on the 9th of October, 1889, taxes to the extent of \$64.12 were levied by the proper authorities. On the 15th day of February, 1890, the company delivered to the defendants their warranty deed for the property bearing date the 10th of February, and put them in possession. After this transfer of title and delivery of possession, on the 28th of February The Coal and Iron Company paid to the proper county treasurer the taxes which had been levied and assessed against the property. At the time these taxes were paid the company made no demand or request that the defendants should pay them, nor did they call on the defendants to pay at any time prior to suit. The copy of the contract, which was a part of the stipulation, lacked sundry indorsements which were on the original, and the parties agreed that "whereas the defendants claim that

there are certain indorsements or writing and figures on the back of the duplicate contract surrendered to plaintiff which is in New York, when said duplicate contract is obtained, any and all indorsements, writings, figures, etc., thereon, shall be copied on the back of Exhibit A and become part thereof," etc. * * * When the original was produced at the trial there appeared on the face of it these words:—"Canceled by substitution of deed to property;" and the defendants asked leave to so change what purported to be a copy as to make it a duplicate according to the spirit, if not the tenor, of the stipulation. This privilege was refused apparently on the hypothesis that the stipulation only applied to the indorsements on the back of the instrument. The county court affirmed the judgment which had been rendered by the justice, and held that the defendants were bound to pay the taxes which the company had settled with the treasurer.

On very plain and well settled principles this judgment must be adjudged erroneous. In view of another trial the questions raised and argued by counsel will be determined, though a decision of one proposition might suffice to reverse the case.

The defendants ought to have been permitted to change the instrument attached to the stipulation, so that the contract set out should, in all of its particulars, recitals and indorsements, conform precisely with the original on which alone the case ought to have been heard and tried. It is quite possible that a very narrow, strict and technical construction of the stipulation might suggest that the purpose of counsel was to permit only the addition of what might appear on the back of the original contract. Such is not a proper or an accurate interpretation of the language of the stipulation. The concluding phraseology provides that all indorsements, writings, figures, etc., thereon shall be copied on the back of the exhibit. These terms do not exclude the right to place on the copy the indorsements on the original, even though they might be on the face of the instrument;

they are broad enough to confer the right to duplicate all indorsements. It is manifest that this must be the proper construction, since it was the evident purpose of the parties to use a copy in place of the original, and we cannot assume that counsel entertained a covert purpose to compel the trial of the cause on an inaccurate copy. Whenever it is stipulated that a copy of an instrument may be used, and it can in any wise be gathered from the stipulation that the copy is incomplete, and that it is to be made to conform to the original for the purposes of the trial, the agreement must be construed, unless the construction is inhibited by the precise terms of the agreement, to intend that the copy may be completed so that in all of its particulars and details it shall exactly correspond with the original paper. No other construction is consonant with good faith, and with what must be assumed to be the honest purpose of attorneys who stipulate with reference to such matters. The amendment by the addition of that indorsement should have been permitted.

It is doubtful whether the contract thus amended, more completely than the other facts contained in the stipulation, demonstrates the nonexistence of a cause of action as against these defendants. The recited facts show that the several parties to this action entered into an executory agreement for the sale and conveyance of certain specified property, upon a definite consideration, payable at a named date, prior to the transfer of the title by the deed of the grantor, who was one of the contracting parties. There are but two things to be done ;—the payment of the consideration, and the execution and delivery of the deed evidencing the title. The proof was that on the 15th day of February, 1890, the deed was delivered to the defendants who were put in possession. According to well settled principles the delivery and acceptance of this conveyance annulled and abrogated the prior executory agreement, which may be no longer resorted to for the purpose of ascertaining the terms on which the land was sold, unless it is shown by otherwise competent testimony that

something remained to be done after the transfer of title. It is probably true that the defendants were bound to pay not only the \$1.435, which was the expressed consideration, but likewise the taxes assessed against the property prior to the conveyance. This is evident from the terms of the written agreement, and it results from specific legislation on this subject. The statute provides that as to all land conveyed between January and May the grantee must pay the taxes which stand assessed against the property. On any hypothesis, then, the taxes which the company paid and sought to recover stood as a legitimate lien on the property conveyed to the defendants, and they took it subject to that lien, which they were bound to discharge. But the company could not recover on the production and proof of the agreement, because it was merged in the deed which they had executed, and this must be deemed to express the final and entire agreement between the parties, and to have been delivered on the payment of the purchase price, unless by competent evidence, and in some legitimate way it be satisfactorily established that the defendants remained liable to pay a portion of the purchase price. There was no such proof in this case. The contract was surrendered and canceled, the deed executed and delivered, the premises turned over to the defendants, and they took the property burdened with the lien for the unpaid taxes, as to which no personal responsibility rested on the corporation. There is nothing in the stipulation to show that the legal effect of these various acts was at all varied by any parol or other contract between the parties, nor that by the terms of the agreement there was any continuing series of acts which would take the case out of the general operation of the law of merger. It must therefore be held that the company could not recover on the basis of the executed contract which was canceled and extinguished by the act of the parties, and by the operation of this well settled doctrine. *Williams v. Hathaway*, 19 Pick. 387; *Witbeck v. Waine*, 16 N. Y. 532; *Jones v. Wood*, 16 Pa. St. 25; *Laflin v. Howe*, 112 Ills. 253; *Bryan v. Swain*, 56 Cal. 616.

Since the plaintiff was not entitled to recover in an action brought on an extinguished contract, he was equally barred to maintain the action by the circumstances of the payment. It will be remembered that the deed was executed by the company on the 10th of February, 1890, and delivered to the defendants on the 15th of the same month when the contract was surrendered and marked "canceled by substitution of deed to property." At that time it is conceded that no cause of action had then arisen in favor of the company. The taxes were unpaid, and the company did not insist on an advancement by the grantees prior to the transfer of title. Subsequently, and on the 28th of February, the company paid the treasurer the \$64.12 for the taxes of the preceding year, which became delinquent on the first of January. At that time they had parted with the title, and under our statute there remained as against them no individual liability to pay them. The taxes were against the property. There was a lien on it in the hands of the grantees, who held it subject to their obligation to pay. If there was any personal liability, it was rested on them. Under these circumstances the payment of the taxes by the company was precisely analogous to the payment of a debt of one person by a stranger, and it is uniformly held that such a voluntary payment gives to the payor no cause of action against the person whose debt he may have liquidated. *Wilkes v. Harper*, 1 N. Y. 586; *Brown v. Chesterville*, 63 Me. 241; *Muller v. Eno*, 14 N. Y. 597; *McGee v. City of San Jose*, 68 Cal. 91; *Fowler v. Moller*, 10 Bosw. 374.

These considerations serve to demonstrate that the judgment cannot be supported upon the case made. The agreed statement of facts is insufficient to show a cause of action against these defendants, and for the reasons given the judgment must be reversed and remanded.

Reversed.

THE DENVER & RIO GRANDE RAILROAD COMPANY, APPELLANT, v. MORRISON, APPELLEE.

1. APPELLATE PRACTICE.

A judgment supported by evidence, although conflicting, will not be disturbed on the ground of insufficiency of proof.

2. SAME—ASSIGNMENT OF ERROR.

A valid assignment of error cannot be predicated upon an objection to the admissibility of evidence which was not preserved save by an exception to the testimony given by one witness, and the whole subject had been antecedently embraced in what had been offered and received without objection.

Appeal from the District Court of Chaffee County.

Messrs. WOLCOTT & VAILE, for appellant.

Mr. G. K. HARTENSTEIN, for appellee.

BISSELL, J., delivered the opinion of the court.

For many years the appellee, Morrison, was the owner and occupant of a ranch along the course of a mountain stream called "Morrison Creek." The Rio Grand Railroad Company constructed its line in the vicinity of Morrison's premises, and built a water tank for the use of its trains in close proximity to Morrison's inclosures. These inclosures contained the usual stables and corrals for his stock, and a house for the occupation of his family. At a point very close to Morrison's yards and where the tank was built, the creek made a bend and went to one side of Morrison's premises in its course to the river. The water supply for the tank was taken out of the creek higher up the stream, and probably about a thousand feet from its location. The waste pipe which discharged the overflow ran but a short distance from the tank to the creek and discharged just above Morrison's yards. The use of the tank was of course intermittent, and

water was only drawn from it as the trains passed and the engines required water. At such times the tank was partially emptied, the overflow ceased and the discharge recommenced when the tank became full. The water was constantly running for the purposes of keeping the tank filled and the pipe from freezing. The result of this practice was that in the cold weather of the winter the overflow would freeze and ultimately stop up the bed of the creek with a solid mass of ice and leave no way for water. Under these circumstances the water overflowed its banks, and flooded Morrison's premises.

Substantially the judgment is not challenged because of any specific error committed by the trial court with respect to the application of the law to the facts. It has been seriously contended in the briefs and on argument that the judgment was wholly unsupported by the testimony, and that therefore the court erred in refusing to direct a nonsuit and in entering judgment against the railroad company. The record is not so barren of proof of damage, nor of evidence to show that the injuries resulted from the negligent use and faulty construction of the tank, as to permit this court to reverse the judgment on those grounds. The proof is not as full and as satisfactory as might be desired, but the question at issue may fairly be said to have been determined on testimony which was conflicting, and under these circumstances we are without right to disturb the judgment for what we may regard as a slight insufficiency of proof. During the progress of the trial it appeared that, after considerable complaint by Mr. Morrison respecting the use of the tank, the company ran its waste pipe some six hundred feet and to a point below the premises. It was shown that after the change in this construction the injury ceased and Morrison was no longer troubled by the overflow of water. There was some complaint by counsel for the appellant respecting the admission of this testimony. Whether it would be admissible under the peculiar circumstances of this case on well settled rules of evidence need not be determined. The contention

was abandoned on argument, because the record disclosed that the objection was not preserved save by an exception to the testimony given by one witness, and the whole subject had been antecedently embraced in what had been offered and received without objection. Counsel very properly conceded that the force of the objection was destroyed, and that no valid error could be predicated on the ruling of the court.

These considerations dispose of all the questions which the record presents for our consideration, and since the court committed no error in the trial of the case the judgment must be affirmed.

Affirmed.

THE RIO GRANDE SOUTHERN RAILROAD COMPANY, APPELLANT, v. DEASEY, APPELLEE.

1. PRACTICE—SPECIAL FINDINGS.

Special findings in a verdict control general findings, and judgment should be entered in conformity with the facts thus established.

2. APPELLATE PRACTICE.

A judgment may be modified in the court and affirmed as modified.

3. COSTS.

Where the judgment may be modified and affirmed, the costs of the appeal may be taxed against the respective parties equally.

Appeal from the District Court of La Plata County.

Messrs. RUSSELL & McCLOSKEY, for appellant.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

In 1890, the Rio Grande Southern Railroad Company was constructing its road through La Plata county. The line as laid out and built crossed a part of the northwest quarter of section 30, which was owned by the appellee, John Deasey.

To acquire title to what was required for railroad purposes, the corporation filed its petition to condemn a way through Deasey's land. Under these proceedings a trial was had and the petition to condemn was allowed on payment of the damages which the jury assessed at the sum of \$500. From this judgment the company appealed to the supreme court, from which under the statute the case came here for consideration.

In one part only is the judgment attacked. The jury rendered a verdict of which the company does not complain otherwise than as to the discrepancy between it and the special findings of the jury on the questions submitted to them. By their general verdict the jury found that the value of the land was \$330, and that the damages which Deasey had otherwise sustained amounted to \$170. The general verdict, however, does not express all the items which the jury is bound to find to make it conform to the statute. Under some circumstances it would undoubtedly have to be set aside for the want of these statutory requisites. But the special findings remove all difficulty in this direction, and by them the jury undoubtedly declared that the defendant had suffered no damages as to the balance of the land not taken, whether it lay north or south of the road, and that the value of what the railroad had appropriated was not diminished by any collateral benefits accruing to the owner. Their conclusions in respect of these matters are clear, definite and unmistakable. Under these circumstances their special findings must control, and the judgment ought to have been entered in conformity with these established facts. It is quite true that in a sort of a summary of the items of which their verdict was composed, the jury stated that they allowed Deasey \$100 for general inconvenience and \$70.00 for some other elements of damage which they specified. This general summarization cannot be permitted to overcome their specific declaration that no damage had come to the owner, or benefit been received by him by reason of the construction of the road through the land. It is thus quite possible to modify and uphold the judgment and evidently do substantial justice be-

tween the parties. The record does not disclose the evidence, but there is enough contained in it to lead us to the conclusion that there would be no want of equity to modify and sustain it, and that therefore it should not otherwise be disturbed. We conclude that that part of the judgment awarding Deasey \$170 damages should be set aside, and that the finding of \$330 for the value of the land should be confirmed. Under these circumstances the usual order concerning the costs ought not to prevail, and they should be divided between the parties.

It is therefore ordered that the judgment be reduced to the sum of \$330, and that as thus modified it should be affirmed, and that the costs of this appeal should be borne equally by the respective parties.

Modified and affirmed.

GODDING, PLAINTIFF IN ERROR, v. DECKER ET AL., DEFENDANTS IN ERROR.

1. VENDOR AND PURCHASER.

The vendee under an executory agreement to purchase real estate has a right to insist upon a marketable title—one without defects of which he could lawfully complain.

2. SAME—FINAL RECEIPT.

That the vendor holds only a final receipt, and not a patent for the land, is not a defect of which the purchaser can complain.

3. RESCISSION.

A decree of rescission will not be entered, if at the time of the hearing the plaintiff is able to remedy the defect complained of and make the title which he undertook to convey.

4. SAME.

It is generally held that a party may not rescind a contract without returning or offering to return the fruits of the agreement, and restoring so far as he may the other to his possession.

5. FINAL JUDGMENT.

No final judgment can be properly entered without disposing of the case as to all the defendants served.

6. PARTIES.

At common law whenever a contract, whether written or verbal, was

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made with two or more persons, their legal interest was joint, and all obligees, covenantees or promisees, if living, were requested to join as plaintiffs, but under section 12 of the Code, where parties jointly interested refuse to join as plaintiffs, they may under some circumstances be made defendants.

Error to the District Court of Prowers County.

IN January, 1888, John E. Godding, plaintiff in error, brought suit against James W. Decker on two promissory notes. The first was dated June 28, 1887, for \$700, due sixty days after date at the bank of Lamar, and signed by Decker, Descent and Godding. According to the pleadings and proof this note was substituted for one dated March 8, 1887, due three months after date, for the same sum signed by Decker and Descent. This latter note was not paid at maturity, and the one sued on was given to take up and protect the unpaid paper. These facts are of little consequence save to make the transaction intelligible. The second note bore date March 8th, was for the same sum due six months after date. Neither note having been paid at maturity, and the renewal promise of June 28th likewise remaining unpaid, the present suit was brought on both notes against Decker alone. On his motion Descent was made a party defendant but failed to answer. Decker answered, admitted the execution of the notes, and set up that these notes were given in performance of a contract entered into between Godding of the one part, and Decker and Descent of the other, whereby Godding sold, and Decker and Descent bought, blocks 40, 41 and 42 in an addition to the town of Lamar. The defendant then averred that he was induced to enter into the contract by the fraudulent representations of Godding concerning his title to the property. At the date of the contract, March 8th, Decker and Descent paid Godding \$700 in cash, and executed these two notes for the balance of the consideration. Decker averred that Godding was without a valid and marketable title, and that the title was in the government. Decker admitted his refusal to pay the notes, and

based his refusal upon the failure of title. In the prayer with which his answer concluded, he asked that the contract be adjudged null and void, and that it be rescinded as to him, and offered to reconvey his undivided one half of the premises. The answer contained no statement that the possession of the premises had been surrendered or any offer to surrender or reconvey other than what is contained in the prayer as stated.

The defendant Decker then undertook to set up a counterclaim on his behalf, and in it substantially averred that on the 7th of March he, with Frank Descent, made a contract with Godding, whereby in consideration of \$700 cash paid, and \$1,400 more to be paid in two installments, three and six months from the date of the contract, Godding agreed to sell to them the described property. Decker then averred that, for the purpose of defrauding him, Godding fraudulently represented that he had a good title and would convey. These averments were followed by an allegation that Godding had no valid and marketable title, but that it was at the time of the contract and afterwards in the government of the United States. He averred damage in the sum of \$350, which was one half of the sum paid on the original contract, and prayed that the contract be adjudged null and void and rescinded, and offered to reconvey, and asked judgment for the specified sum. The counterclaim contained no statement concerning the possession or surrender, and was without any averment of an offer to rescind, or an offer to reconvey, prior to the suit. The plaintiff replied and denied all the allegations, and then set up that when the bargain was made and the money paid he executed a bond to Decker and Descent in the penalty of \$4,000, which recited that Godding had agreed to sell Decker and Descent certain described property, and that the bond had for its condition that, if Decker and Descent should pay the notes at maturity, and the taxes on the blocks, Godding should, on the completion of the payments, execute and deliver a good and sufficient warranty deed to Decker and Descent, or to such persons as

they might name. The bond recited that in case of a failure to pay, Godding could treat Decker and Descent as tenants holding over, or might enforce the payment of the notes. The bond further provided that, if the purchase money should not be paid according to the tenor of the notes, then Decker and Descent should forfeit that part of the consideration paid. In his reply Godding stated that on the 8th of March he held a receiver's receipt for the land, and that no contest respecting his entry was pending in the land office, although he admitted that one Carrie Myton had filed a protest in the land office at Lamar, protesting against the making of any title to him. The protest was dismissed, and the receiver's receipt issued prior to the time the contract was made, and these facts seem to have been fully known and discussed between the parties at the time of the sale. The case was tried largely on a stipulation which disclosed the issuance of the receipt on the 23d of February, 1887, the platting of the land, the making of the contract as stated in the pleadings, and its performance to the extent mentioned. The bond was set out, the record of the receiver's receipt stated, and by express agreement the controversy was narrowed to the consideration of four matters. First, the circumstances of the execution of the paper signed by Decker, Descent and Godding. Second, Godding's representation as to his title to the premises. Third, the knowledge which Decker and Descent had concerning the situation of the title. Fourth, the proof as to the title which was to be attacked. This was to be made subject to objections by the production of a transcript from the land office in the matter of Carrie Myton's protest, and sundry letters from the officers of the land department of the government concerning the protest and its disposition.

Descent and Decker were fully informed concerning the status of Godding's title, and they bought and took the bond knowing that he held a receiver's receipt, issued after a protest had been filed by Carrie Myton in the local office where Godding's application was pending. The only evidence offered under the stipulation concerning the proceedings in the

land office may be conveniently subdivided into three parts. The first called "exhibit C" appears to be a kind of docket recital of what was done in the local land office. It is a chronological statement by the register of the land office of what was done, but contains no copies of any instrument filed, nor any copies of papers showing what was done otherwise than as may appear from these docket entries. The evidence was objected to but admitted. The defendant followed this proof by a copy of a letter from the commissioner of the land office reviewing the proceedings of the local officers, and concludes with an order which in effect undertakes to suspend the entry and reinstate the case for hearing. A rehearing was had, the original action of the local officers reaffirmed, and this action was apparently again subjected to review in the land office at Washington. The plaintiff introduced the commissioner's letter showing that the department sustained the action of the local officers and affirmed the validity of the entry. This last letter was dated August 31, 1889, and was some five months prior to the final decree in the case. It is contended that an appeal was taken from this decision of the commissioner to the secretary of the interior, who is the head of the land department, but it is proven only by this recital in exhibit C:—"Appeal filed November 19, 1889, and transmitted to the Commissioner G. L. O. December 24, 1889."

The evidence disclosed that Decker and Descent went into the possession of the property at the time of the making of the contract and dealt with it as owners, and negotiated with divers parties with reference to the sale of a portion of the lots embraced in the blocks which they purchased.

On this record and proof a decree was entered which substantially recited that Godding was indebted to Decker for \$350, with interest at ten per cent from March 8, 1887; that he should recover nothing on his promissory notes, and that the contract between Godding and Decker and Descent should be rescinded and be held null and void as to Decker, and that Decker should reconvey an undivided one half in-

terest in the property acquired by virtue of the contract. An execution was ordered accordingly. There was no finding, disposition, or determination of the controversy in so far as regarded Descent, although it appeared that a summons was issued to him on October 4th, and served October 9th. Descent was thus brought into the case by process, but his rights and interests, and Godding's rights and interests as to him, were left wholly undetermined.

To review this judgment and decree Godding sued out a writ of error.

Mr. BYRON L. CARR and Messrs. STEELE & MALONE, for plaintiffs in error.

Mr. CLARENCE WAY and Mr. JAMES S. MCGINNIS, for defendants in error.

BISSELL, J., delivered the opinion of the court.

In many particulars the contract under consideration was executory. It had not been concluded by the transfer of title, and the balance of the consideration was to antedate in its payment the delivery of the deeds. It therefore follows that Decker and Descent are not brought within the scope of the principle which obligates them to resort to the covenants in the deed for their remedy, but they are entitled to set up a want of consideration, and the defects in the title, if any, when sued for the purchase price. Their right to insist upon a marketable title is equally clear. It is now almost universally conceded that an agreement to make a good title is implied in every executory contract for the sale of lands, and that the purchaser cannot be compelled to accept one that is defective unless he has expressly agreed to receive whatever the vendor may be able to convey. *Powell v. Conant et al.*, 33 Mich. 396; *Murphin v. Scovell*, 41 Minn. 262; *Moore v. Williams*, 115 N. Y. 586; *Swan v. Drury et al.*, 22 Pick. 485; Rawle on Covenants for Title (4th ed.), p. 43.

The agreement concerned real property, and by the terms

of the bond Godding agreed to sell to Descent and Decker the premises named in the instrument. The implied obligation raised by the terms of the instrument was that he should transfer title without defects of which the defendants could lawfully complain. It must be ascertained what title Godding had and what the record discloses concerning its alleged imperfection. It must be conceded that the fee was in the government. Godding only held the receiver's receipt for the purchase money. That this is a good title concerning which parties may contract, and which a vendee will be bound to take if it be evidenced by receipts properly executed by the officers of the government, can scarcely be questioned. This matter is fully covered by the statute and amply settled by a long course of federal adjudication. The Colorado statute declares in section 1310 that the certificate of the register and receiver of the purchase of any tract of land shall be deemed and taken as evidence of title. It is declared to be superior to all other evidence of title to government land, except a patent from the government for the same identical tract. Land thus entered has always been held to be the subject of contract and sale, and the receipt of the money and the issuance of the certificate have universally been held to be such a segregation of the land from the public domain as to entitle the party to his patent, and to warrant legal proceedings for the purposes of procuring it. *Carroll v. Safford, etc.*, 3 How. U. S. 441; *Meyers v. Croft*, 13 Wall. 291; *Simmons v. Wagner*, 101 U. S. 260; *Deffebach v. Hawke*, 115 U. S. 392.

Under these authorities Godding had a title concerning which he had a right to bargain; it was marketable, and it was not, in legal contemplation, clouded by defects of which the vendees had a right to complain, unless in some legitimate manner it was established that the Myton protest constituted such an imperfection. There are many reasons why this cannot be true. There is a broad distinction between the rights of a contestant and those enjoyed by one who simply files a protest to inform the government that the ap-

pellant is without right to enter the land. If the register and receiver see fit to take the applicant's money and issue him a receipt which evidences his purchase of the land, the effect of that certificate cannot be destroyed by any subsequent appeal which may be taken by the protestant. It is undoubtedly true, under the federal statutes, sections 453-2478 R. S., that the disposal of the public land is committed to the authority of the officers of the interior department, and they may withhold the certificate of purchase pending a subsequent hearing concerning the right of the claimant to enter. It is equally true that, if the certificate has been issued, the land office may, under certain circumstances, cancel the entry. *Cornelius v. Kessell*, 128 U. S. 456.

This concession does not affect the present case, since the question here is, whether the title was rendered defective by the appeal which it is contended the protestant took from the decision of the commissioner of the general land office to the secretary of the interior. It is not discussed, nor is it decided, what effect on the title the action of commissioner Sparks in suspending the entry had with regard to it, since subsequent to this action the entry was affirmed and the action of the local land officers sustained. This was done prior to the trial of this suit, so that when the proofs were made, and the decree entered, Godding had a title evidenced by an unsuspended receipt which was in full force and affected by nothing unless by the alleged appeal. The right of appeal is only given in those cases where questions arise as to the right of pre-emption between different settlers: U. S. Revised Statutes, § 2273.

The right of appeal being thus expressly conferred upon certain classes of persons, it must, by the very force of the expression, be held to exclude protestants from the class to which the right is given. The legitimate result of this reasoning is, that the attempted appeal by Myton from the commissioner to the secretary did not constitute a defect which entitled the vendee to insist upon the rescission of the contract, and permitted him to defend in an action for the re-

covery of the purchase money. If this conclusion were unsatisfactory and not so adequately sustained, it would still be held that there was no proof of any legal defect justifying a rescission. The exhibit which the defendant offered in evidence to show that an appeal had been taken was not competent proof of any such fact. The notice of an appeal in accordance with the rules and practice of the land office, or a certified copy of it if admissible, was the only legitimate evidence of the taking of that step.

With respect to the character of the title, it only remains to consider whether it is enough for the vendor to be able to make a good title at the time of the decree, or whether his title must have been perfect at the time he entered into the agreement. It seems to be well settled that the court is not authorized to decree a rescission, if at the time of the hearing the plaintiff is able to remedy the defect complained of and make the title which he originally undertook to convey: *Kimball v. West*, 15 Wall. 377; *Diggs v. Curby*, 40 Ark. 420.

It is conceded that this principle is necessarily subject to some modifications, and that the plaintiff must respond to whatever damages the vendees may have sustained by reason of the delay in the completion of the agreement. The exception need hardly be stated, since the record is barren of testimony respecting this matter. It is only referred to lest on the subsequent trial the rule may be assumed to have been too broadly stated.

The force and application of these principles is not destroyed by the form of the defense, nor affected by the circumstance that Decker alleged fraud in the procurement of its execution. In respect of this particular feature of the case, the record is barren of any evidence which even tended to show misrepresentation on the part of the vendor concerning his title. Decker stated on the stand that the situation and the character of Godding's title had frequently been made the subject-matter of discussion prior to the purchase, and that the execution of the agreement had only been delayed to await the delivery of the receiver's receipt, which

both parties assumed would make a valid title concerning which they might contract. In respect of this matter, the present seems to be one of those cases where what appeared like a valuable acquisition at the time it was initiated turned out to be a bad bargain, from which the vendee would like to escape.

Decker was not entitled to defend the action for the consideration money, because of the character of the title which Godding was able to convey. He was equally without right to insist on the rescission of the contract because of the alleged fraud of the vendor.

That part of the decree which rescinds the contract is not justified by the record. It is quite generally held that a party may not rescind a contract without at least returning, or offering to return, the fruits of his agreement, and restoring so far as he may, either in fact, or by tender, the other to his original possession. Decker's answer contained no allegation that he had surrendered or had offered to surrender possession, or that he had conveyed, or offered to reconvey any title which he had, or that he had released, or offered to release Godding from his contract. *Martin v. Chambers*, 84 Ills. 579; *Dennis et al. v. Jones*, 44 N. J. E. 513; *Garrett et al. v. Lynch*, 44 Ala. 204; *Knuckolls v. Lea*, 29 Tenn. 577; Warvelle on Vendors, chap. 31, p. 849.

The defendant was as negligent in his proof as he was in his plea, for he failed to show any offer to perform on his part, or any demand to rescind, and at the date of the trial remained in possession and control of the property. He did not therefore entitle himself to a decree for the rescission. There is another reason equally fatal to the decree entered. It is in the form of a judgment in favor of Decker and against Godding for the rescission of the one half of a joint contract and the recovery of an aliquot part of a joint right in favor of one who occupies the position of a plaintiff in an action. The action as originally brought was on two promissory notes against Decker alone, to recover that which, under our statute, he was severally liable to pay. It was no defense to him

that the joint maker was not sued. It appears that after the institution of the action Descent was on Decker's motion served with process and brought into the suit. This may be of small consequence in the determination of the question which will be discussed, but it is referred to to show the anomalous character of the result arrived at. Descent never appeared in the action. Having been served with a summons it was indispensable that some action be taken concerning this defendant. Descent was before the court, and no final judgment could properly be entered without disposing of the case as to all the defendants served. *Bissell et al. v. Cushman*, 5 Colo. 76.

Regardless of this technical defect which would necessitate the reversal of the judgment, it must be adjudged upon a broader basis that Decker's cross complaint cannot be sustained. It will be recollected that after setting up his defense of a want of consideration and fraud inuring in the agreement, Decker filed a cross complaint setting up the same fraud, and thereby sought to recover from Godding the one half of the \$700 which he and Descent originally paid as part of the purchase price. This he was permitted to do, and judgment passed in his favor. From the cross complaint it appeared that the agreement was between Godding of the one part and Decker and Descent of the other, and that the only promise which Decker made was to convey to them jointly on the payment of the consideration specified. It necessarily follows that if the cause of action set up in the cross complaint grows out of the contract entered into between Godding of the one part and Decker and Descent of the other, it was a joint right running to Decker and Descent, and not a several contract running to each. It was universally true at the common law that wherever a contract, whether written or verbal, was made with two or more persons, and their legal interest was joint, all the obligees, covenantees or promisees, if living, must join as plaintiffs. There was no such thing as a joint and several right, corresponding to the joint and several liability of various promisors. It

was either several so that one only could sue, or joint so that all must sue. This legal distinction has not been varied by any statute in this state except in one particular. Doubtless according to one provision of our Code of 1887, section 12, under some circumstances where parties jointly interested refuse to join as plaintiffs they may with proper pleadings be made defendants, and the sole plaintiff thereby overcome this limitation on his right to sue. Decker did not attempt to bring his cross complaint within the scope of that provision. He simply filed a cross complaint and sought to recover his half of a joint cause of action. This he could not do. The proofs amply demonstrate that it was a sale to both, a contract with both, and whatever was done concerned their common interest. If any cause of action came to them by reason of the contract it came to them jointly, and they must unite in whatever action they would bring. This principle was plainly recognized in *Exchange Bank v. Ford*, 7 Colo. 314, where the court construed that section of the code which authorizes an action to be brought against one when there may be a liability on the part of several. It is wholly unnecessary to enter into a discussion to establish that where one party files a cross complaint he thereby becomes a plaintiff, and can only maintain his remedy under that pleading, by proof which shall show that he, on whose behalf it is filed, has a cause of action which he is entitled to maintain against the plaintiff in the suit. This did not appear in the present case, and therefore under the cross complaint the court could not rightfully enter a judgment in favor of Decker for the one half of the money originally paid.

The judgment for the one half of the purchase money necessarily depends on that part of the decree which rescinds the contract. When it is determined that neither the alleged fraud nor the character of the title brings this right to Decker, it concludes him as to the payment which was made when the contract was entered into. By the express terms of the agreement the vendees were to forfeit what they paid on the 8th of March, if they failed to pay the balance of the agreed

price. So long then as the agreement was untainted by fraud, and there was no breach of the implied covenant to convey a good title, no cause of action for any part of what had been paid could arise in favor of Decker and Descent, or either of them.

These are all the questions which it is deemed necessary to consider, either for the purposes of the present decision, or with respect to any subsequent trial which may hereafter occur. For the errors committed by the court with respect to the matters discussed this judgment must be reversed and remanded.

Reversed.



WOODBURY, APPELLANT, v. HINCKLEY, APPELLEE.

1. COMMERCIAL PAPER—DEFENSES.

An indorsement of a promissory note after maturity passes the title, but does not prevent the maker from interposing any defense he had against the payee.

2. COMMERCIAL PAPER—PRACTICE.

Questions as to the ownership of the note sued on which was transferred after maturity are of no importance to the defendant. Such questions only become important when the transfer prevents a defense.

3. ERROR, WHEN CURED.

After the overruling of a motion for a nonsuit the error is obviated by evidence of the party in his own behalf, which supplies the defect existing in that of the plaintiff.

Appeal from the County Court of Arapahoe County.

Messrs. NORRIS & HOWARD, for appellant.

Mr. RALPH TALBOT, for appellee.

REED, J., delivered the opinion of the court.

Suit was brought before a justice of the peace upon a

note of \$200, with interest, dated February 5, 1890, executed by appellant, payable to the order of George R. Smith; on July 1st following, was indorsed in blank by the payee. It appears to have been established and conceded upon the trial that the note was indorsed after maturity, consequently, was open to any defense the maker had against the payee.

Prior to February 1st, the date of the note, Woodbury, Smith and one Simmons had been partners in business. On that date appellant bought Smith's interest in the business and the partnership was dissolved. In the purchase of such interest, the note in question was made, also another maturing later. At the time of the purchase and dissolution, as appeared by the partnership books, Smith owed the other members of the firm near \$200. Upon the trial appellant claimed to have bought the account from his partners, and attempted to set it off against the note. It was contended by the plaintiff that appellant assumed such indebtedness of Smith at the time of the purchase, and that the notes were given for the balance. The court so found with the exception of one item of about \$12.00, which was allowed as a set-off. An appeal was taken to the county court from the judgment of the justice of the peace; a trial had to the court, judgment for plaintiff for \$195.55, sustaining the judgment below. Appeal was taken, and the case came into this court.

Upon the trial the note was offered in evidence; it was objected to because the signature of the maker had not been proved, and it was not shown that the plaintiff was the owner of the note. The objection was overruled, note admitted in evidence, and plaintiff rested. Defendant moved for a nonsuit on the same grounds contained in the objection above stated. The motion was denied, and the denial assigned for error. This is the only error relied upon in argument.

The note was negotiable, the title passed by the indorsement, its transfer after maturity was conceded, and the defendant allowed to interpose any defense he had against the payee; consequently, it was to the defendant a matter of no

importance who owned the note. Such questions only become important when the transfer prevents a defense.

It is very doubtful under our statute whether plaintiff is required to prove the execution of the note unless its execution is denied under oath, but it is not necessary to decide the question in this case. Instead of relying upon his motion for a nonsuit, defendant went on and interposed his defense, himself testifying to its execution and delivery. "After the overruling of a motion for a nonsuit the error is obviated by evidence of the party in his own behalf, which supplies the defect existing in that of the plaintiff." *Railway Co. v. Henderson*, 10 Colo. 1; *Jennings v. First Nat'l Bank*, 13 Colo. 417.

This supposed error being the only one relied upon by counsel, and the judgment being warranted by the evidence, it will be affirmed.

Affirmed.

BLOOM ET AL., APPELLANTS, v. WEST ET AL., APPELLEES.

1. WATER RIGHTS.

Water rights are not appurtenances.

2. WATER RIGHTS—CONSTITUTIONAL LAW.

Section 6, art. 16 of the Constitution, which provides that "priority of appropriation shall give the better right, as between those using the water for the same purposes," applies to the respective rights of different parties, claiming the same interest adversely.

3. WATER RIGHTS—EVIDENCE.

As water rights are not appurtenances, proof of title to the land on which they have been used is not required in an action between the purchasers thereof to determine their respective rights; the extent of the land irrigated can only be regarded as data upon which an equitable division of the water may be based.

Appeal from the District Court of Las Animas County.

A SUIT in chancery was brought by appellees to be declared to be the owners of one eighth of the water carried by an ir-

8	212
7	119
3	212
8	245
3	212
24c	497

rigating ditch known as the "The Hoehne Ditch," and in addition to one eighth, of an indefinite quantity, described in the complaint to be "the owner of the right to use for irrigating, (certain lands described amounting to forty acres or more,) *that portion of said water conveyed by said ditch necessary for the proper irrigation for agricultural purposes of said land, and is the owner of the right to use said ditch for conducting said amount of water necessary for the irrigation of said land for agricultural purposes to the same.*"

It appears by the pleading and evidence that other parties, who were made defendants, were the owners of three fourths of the ditch; that their ownership and rights were conceded. The contest being over the remaining one fourth claimed to have been owned by appellee, West, and Bloom and his associates in common, their respective rights and ownership of the one fourth never having been determined.

Plaintiffs asked to be decreed to be the owners of the interests as above stated, and that the defendants (appellants) be enjoined from in any way interfering with it. The defendants answered, admitting, by inference, the ownership of plaintiffs of one eighth of the ditch, admitting also that they were the owners of one eighth, as stated in the complaint, but denying the right of the plaintiffs to any interest in such eighth, or to the use of any such water right from it as claimed in the complaint for the use of the lands described; and for further answer, and what may be regarded as a cross complaint, filed the following:—"That on or before the 31st day of October, 1879, one Michael Bashor was the owner of an undivided one fourth interest in said Hoehne Irrigating Ditch; that at said time and prior thereto, he used the water conveyed by said ditch equal to one fourth thereof to irrigate the northeast quarter of section five and the southwest quarter of the southeast quarter and the north half of the southeast quarter of section five, township thirty-two, south, of range sixty-two, west; that on or about the said date, the said Bashor conveyed to the plaintiff, West, an undivided one sixteenth interest in said ditch, but that it was provided in

said conveyance that said Bashor should retain the use of said water conveyed to said West, at all times when the said West did not desire to use the same.

“The defendants further alleged upon information and belief that said West never appropriated the use of said water, above specified, but for a temporary use and purpose of dipping sheep, which required but a few days during the season; that at all other times said water was used and appropriated by said Bashor upon the lands above described, and more particularly upon the lands hereinafter described which were conveyed by said Bashor to these defendants.

“That on March 29, 1883, said Bashor conveyed to these defendants the west one half of the southeast quarter and the west one half of the northeast quarter of section five, and by said conveyance, also, an undivided one eighth interest in said irrigating ditch, and that by said conveyance, the said Bashor also conveyed all the appurtenances appertaining or belonging to said lands; that said Bashor had prior to said time conveyed the east two thirds of the east half of the northeast quarter of section five, together with an undivided one sixteenth interest in said ditch.

“That defendants are informed and believe that the remainder of said water equal to one fourth of the water conveyed by said ditch continued to be appropriated upon the other lands owned by said Bashor up to the time the same were conveyed to these defendants.

“The defendants further allege upon information and belief that the amount of land in cultivation upon which said water was used for irrigation upon that proportion of the lands conveyed to these defendants was greater than the amount of land in cultivation upon all the other lands owned by said Bashor.

“The defendants further alleged that there had never been a partition or division of the water used upon said lands purchased by Stanton and Presnell, to wit: The east two thirds of the northeast quarter of section five.

“The defendants alleged, upon information and belief,

that there was a greater amount of water used and appropriated upon that portion purchased by these defendants equal to one twentieth interest in said ditch.

"The defendants further alleged that the said West has claimed the right to appropriate one eighth of the water conveyed by said ditch upon the land owned by him, as described in the complaints.

"Wherefore defendants demand judgment against the plaintiffs for a decree of this court, establishing their right to use that portion of the water conveyed by said ditch in addition to the one eighth owned by them, equal to the proportion greater than one eighth which was used, consumed and appropriated upon the lands which they now own, and for such other and further relief as may be meet and proper."

To which new matter of defense and cross complaint a replication and answer were filed, traversing all the material allegations. A trial was had to the court; a finding in favor of the plaintiffs and a decree entered, the material part being as follows:

"Now therefore, it is hereby ordered, adjudged and decreed that the plaintiff West is the owner of an undivided one eighth interest in said ditch and the waters conveyed thereby, and in addition thereto, is the owner of the right to conduct through, over and along said ditch sufficient water to irrigate for agricultural purposes the said west third of the northeast quarter of southeast quarter of section five, township thirty-two, south, range sixty-two, west, as an appurtenance to said land, which sufficiency is one seventy-second of the water conveyed by said ditch; and that the defendants, Bloom and J. A. and Malon D. Thatcher, are the owners of an undivided one eighth interest in said ditch and the waters conveyed thereby, less and subject to the right and interest of plaintiff West to take from said last mentioned one eighth sufficient water to irrigate the said west one third for agricultural purposes, which sufficiency is hereinbefore defined as one seventy-second of the water conveyed by said ditch, and to the same through, over

and along said ditch to said land as an appurtenance thereto.

“It is further ordered and decreed that the defendants be and are hereby perpetually enjoined from interfering with the interest in said ditch hereby deeded to plaintiff West. It is further ordered that each of the parties pay one half the costs of this proceeding.”

The defendants were also perpetually enjoined from interfering with the water so decreed. An appeal was taken from such decree.

Mr. J. M. JOHN, for appellants.

Messrs. WALDRON & HILLHOUSE, for appellees.

REED, J., delivered the opinion of the court.

It appears that as early as 1872 Michael Bashor owned or had possessory titles, or claims, and the possession of the lands now owned by both parties litigant; also, that the Hoehne ditch was in existence and carrying water, and it appears to have been conceded that Bashor was the owner or had the right to one fourth of the water carried by the ditch for the use of his lands. In course of time, Bashor's lands were divided and passed by conveyances, so that at the time of instituting this suit each of the parties were owners of a portion of it. Neither the date of the construction nor capacity of the ditch are given. It is not shown how Bashor became the owner of one fourth, or that he at any time had any evidence of title. It is only shown that he was the owner of the water, and that it was used by different tenants occupying different parcels of the land. The quantity of water separate parcels were entitled to were very indefinitely defined, if at all. West, for instance, it appears was using his place for sheep raising, and for a long time only used water for “dipping sheep” and stock purposes. When not so used, other parties used it upon other parts of the land. The farming upon other parts of the land seems to have been

some years confined to a few acres, other years more, and some years upon portions no farming whatever was done. This desultory and uncertain use of water continued for several years, and the land passed into the hands of the parties to this suit. It does not appear that Michael Bashor or any of the mesne conveyancers ever conveyed any water or water rights whatever. Such rights appear to have passed by common consent or understanding with the lands, and as the original right of Bashor to one fourth of the water is by the co-owners conceded, and that is all that both parties claim in the aggregate, no title is in question; the only question being how that one fourth should be divided between the two sets of landowners respectively.

In the decree it is said, after describing the land, the water decreed shall pass "*as an appurtenance to said land*," and counsel upon the trial appear to have been in harmony with the court in regarding the water as appurtenant to the land. This view originated either in a misconception of the law or in the unfortunate use of a word, for want of a better. Webster defines appurtenance as "that which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy," etc.

Blackstone defines "appurtenance:"—"belonging; pertaining; incident, as a right of way *appurtenant* to land or buildings."

Bouv. Law Dic.:—"Things belonging to another thing as principal, and which pass as incident to the principal thing;" and this definition is sustained by numerous legal decisions, both English and American. Technically, property tangible and corporeal, capable of sale, of transfer and of use in another place, cannot be regarded as appurtenant to land; it must be incorporeal, an easement, a servitude. In Coke Litt. 121, it is said, "that nothing can be appurtenant unless the thing agrees in quality and nature to the thing whereunto it appertaineth; as a thing corporeal, properly, cannot be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal," and this legal fact is rec-

ognized to the present day. According to the recent legal decisions, a party, who owns land and the right to use water from an irrigating ditch or canal, has two separate and distinct rights of property, either of which could pass by assignment or conveyance, regardless of the other. Hence, the right to the use of water for irrigation from an artificial canal for conveying it, cannot be regarded as appurtenant to the land, technically, nor at common law.

The physical condition of the country, the worthlessness of land without water, and the great value of the two taken together should go far in establishing, in all cases of this kind, joint ownership of the ditch, and its construction for the sole purpose of applying the water owned by each, respectively, to the reclamation of his own land and applying it to that purpose; the necessity of the union of the two making them one estate and the water right an easement, appurtenant and inseparable. Many able lawyers have so regarded such conditions, and efforts have been made, unsuccessfully, to have the doctrine established by the courts. In *Strickler v. Colo. Springs*, 16 Colo. 61, the question of the relation of water to land under conditions above stated, was squarely presented and authoritatively decided. It is there said:—"It logically follows that the right to the use of the water for irrigation is a right not so inseparately connected with the land that it may not be separated therefrom. * * * The authorities seem to concur in the conclusion, that the priority to the use of water is a property right. To limit its transfer * * * would in many instances destroy much of its value. * * * What difference can it make to others whether the owner of the priority in this case uses it upon his own lands or sells it to others to be used upon other lands?" In that case it was held that water originally applied to specific lands for irrigation could be sold, taken out at a different point; could be carried in a different ditch in no way connected with the land, and could, by the purchaser, be applied to a different and distinct use, clearly recognizing two separate and distinct estates entirely disconnected, one in the land and the other in water.

At the time of the trial of this case the decision had not been made, but it will readily be seen that it is utterly repugnant to the idea of water as "appurtenant" under any circumstances. But the decree in this case may be put upon another and the true ground, and affirmed.

The real and perhaps the only question tried was, the application of the water in question to the different parcels of land and the priority and quantity applied, respectively, to the different parcels of land by the original claimant before the estate was divided. Much of the testimony of each side was inconclusive and unsatisfactory—necessarily so from the great length of time since the application of the water, and depended entirely upon the memory of the witnesses.

By sec. 6, art. 16, of the Constitution, it is said: "Priority of appropriation shall give the better right as between those using the water for the same purpose," etc. This is evidently intended to apply to the respective rights of different parties claiming the same interest adversely. Where, as in this case, there is no adverse claimant and the assumed priority is predicated upon the prior application and distribution of the water by the owner of different parcels of the same estate, there is grave doubt if it has any application whatever, when a water right is declared not to be appurtenant but a separate and distinct property interest. Hence, we cannot regard priority in the distribution and use of water on different parcels of land by the common owner as conclusive or controlling.

But the controversy may be regarded as an attempt to equitably settle the respective rights of the parties, and as such, the prior application and use of the water upon the respective tracts was a proper subject of inquiry, as between the parties the right of each would seem more nearly a "prescriptive" right than any other, and the parties may be supposed to have dealt with their common grantor on the basis of water distribution as it had previously existed at the time of the respective conveyances. Viewing it in this light, we cannot agree with counsel that the decree was contrary to

the law and the evidence, which are the principal errors assigned and relied upon. Although in some respects unsatisfactory, there was evidence sufficient to warrant the decree. Nor do we see that any principle of law was violated. It seems to have been simply a question of fact.

It is ably contended that appellee failed to prove by proper testimony a title to the land. If proof of title was necessary, it does not seem to have been insisted upon at the trial and exceptions saved so as to make it available upon appeal. The water right, if legally appurtenant, and an incident to the land, could only be established by proof of title to the land to which it appertained, but, being as declared in the Strickler case, *supra*, a separate and distinct property right, no property in the land need have been shown, and the land, the extent, number of acres irrigated, etc., can only be regarded as data upon which an equitable division of the water could be based. It must be conceded that it was rather an unsatisfactory manner of ascertaining what each claimant purchased, but seems to have been the best, if not the only available, method of arriving at a conclusion.

The decree of the district court, in so far as it declares the respective rights of the parties to the water, will be affirmed, but the case will be remanded to enable the court to amend its decree, by confining it to declaring the share owned by each, and striking out that portion connecting it with the land as an appurtenance.

Affirmed in part, and remanded to have decree amended.

MARTIN, PLAINTIFF IN ERROR, v. PITTMAN, DEFENDANT IN ERROR.

1. PRACTICE.

Both parties having regarded and treated this action as one arising under the statute, and there being no evidence to the contrary, it is considered as such by the court.

2. STATUTORY ACTION—CONDITIONS PRECEDENT.

To entitle a settler upon the public lands of the United States to maintain any of the actions mentioned in section 8 of chap. 90, Gen. Stats., he is required, as conditions precedent, to have his claim marked out so that the boundaries thereon may be readily traced and the extent of such claim easily known, and to be in actual occupancy of the claim or to have made improvements thereon to the extent of one hundred dollars.

3. STATUTORY ACTION, HOW MAINTAINED.

A statutory action cannot be maintained, except by showing a strict compliance with the requirements of the statute.

Error to the County Court of Grand County.

Mr. W. C. FULLERTON, for plaintiff in error.

Mr. O. D. BRYAN, for defendant in error.

REED, J., delivered the opinion of the court.

The defendant in error on April 29, 1889, filed a pre-emption claim upon certain land in Grand county; had the tract surveyed; put eight logs in the foundation for a cabin valued at \$10.00; worked upon the place about eleven days grubbing, which was all the improvement—never resided upon the land; about July 15th left the neighborhood for a temporary absence; returned about August 20th. During his absence plaintiff in error entered upon the land and cut wild hay, growing on some part of it; also, "picketed" his horses and destroyed the hay upon another part. Martin refusing to pay for the damage, Pittman brought suit before a justice of the peace and obtained a judgment. Martin appealed to the county court; a trial had to a jury, resulting in a verdict and judgment for Pittman of \$1.60 and costs, stated to be \$316.70.

The only question presented here for determination is whether the possessory title of Pittman to the land was such as to enable him to maintain an action for the entry and damage. There is no conflict in the testimony. The alleged

entry, cutting of hay and picketing of horses is apparently admitted, but from the evidence it seems impossible to understand the tenure of the claim by which the land was held by Pittman. He says that he filed upon it as a pre-emption at a certain date, which would indicate a filing in the United States land office, and an attempted holding under the law of congress, yet no such proof is made, nor does it seem to have occurred to either party that, if such were the fact, his possessory title was dependent upon compliance with the pre-emption act. In the absence of all evidence, and both parties having regarded and treated the action as one arising under chap. 90, Genl. Stat., entitled "Public Lands," it must be so regarded in this court. By sec. 8 of the act, "any person settled upon any of the public lands belonging to the United States may maintain trespass *quare clausum fregit*, trespass, ejectment, forcible entry and detainer, unlawful detainer, and forcible detainer for injuries done to the possession thereof," but as conditions precedent to the right to maintain any action for the invasion of his possession, by sec. 10 of same chapter, he is required to have such claim "marked out so that the boundaries thereof may be readily traced and the extent of such claim readily known," and must be in the actual occupancy of the claim or have made improvements on it to the value of \$100. Pittman's testimony showed he was neither occupying nor had made the requisite improvements, and there was no evidence of any marking out and proper defining of the boundaries.

The action is purely statutory. The statute is in derogation of the common law. A party to avail himself of its benefits must prove strict compliance with its requirements. "When a new right, or the means of acquiring it, is given and an adequate remedy for violating it is given in the same statute, the injured parties are confined to that remedy." Potter's Dwar. on Stat. 275; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Thurston v. Prentiss*, 1 Mich. 193; *Bassett v. Carlton*, 32 Me. 553; *Burwick v. Morris*, 7 Hill (N. Y.), 575; *Adkison v. Hardwick*, 12 Colo. 581.

Several other supposed errors, occurring upon the trial, are assigned, but it will not be necessary to dispose of them. The failure to establish the right to maintain the action by showing strict compliance with the statutory requirements is conclusive of the case.

The judgment must be reversed and cause remanded.

Reversed.

BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY,
PLAINTIFF IN ERROR, v. THE ASPEN MINING AND
SMELTING COMPANY, DEFENDANT IN ERROR.

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d19 278

1. CONSTITUTIONAL LAW—TITLE OF ACT.

The words "and for other purposes" in the title of an act amount to nothing as a compliance with the constitutional requirement Nothing which the act could not embrace without them can be brought in by their aid.

2. SAME.

New and different sections cannot be interpolated into a statute by an act the title of which is specifically limited to an amendment of one section and a repeal of others.

3. SAME.

The subject-matter of an act specifically amendatory of a designated section must be germane to the section amended.

4. STATUTORY CONSTRUCTION.

The words "who may be" occurring in a statute, providing that all persons, etc., shall, on application of the road overseer, furnish the names of the persons in their employment, "who are or may be liable to the payment of a road tax," etc., can only be construed as meaning in the future, and impose an impossibility.

5. PRACTICE.

The prosecution must show, in an action under this statute, that some of the defendant's employees were legally liable to a road tax, otherwise, no violation of the statute could be established.

Error to the County Court of Pitkin County.

THE action was brought by the appellant, plaintiff, against the defendant to recover \$100, a penalty prescribed by section 3, chap. 95 of General Laws as amended by an act of

April 2, 1887, entitled "An Act to amend section 29 of chapter XCV. of the General Statutes of the state of Colorado, entitled 'Roads and Highways,' and to repeal sections 30, 31, 32 and 33 thereof, and for other purposes." By such amendatory act a new section was substituted in the place of sec. 29 of the original act, and secs. 30, 31, 32 and 33 were repealed and a new section (3, of the amendatory act) was enacted and interpolated in the general statute, as follows:

"Sec. 3.—All persons, corporations, companies and individuals are hereby required, on application of the road overseer of his, her or their road district, to furnish to said road overseers the names of persons in his, her or their employment, when employing ten or more of such, who are or may be liable to the payment of a road tax under the provisions of this chapter, and in the event of a willful refusal, failure or neglect so to do within ten days after such application, shall forfeit and pay to the county the sum of one hundred dollars for each refusal, failure or neglect so to do, such sum to be recovered by said county as in other civil actions, brought and maintained in any court of competent jurisdiction; and when collected such moneys shall be paid into the said special fund, to be used in the same manner as moneys collected in said judgments for tax."

Under the provisions of this section in the year 1888, the road overseer made a demand upon the general manager of the defendant to furnish a list of employees as required; the demand was refused, and this action was brought to recover the prescribed penalty. The suit was originally brought before a justice of the peace. There were no written pleadings. On appeal, it was tried to the court without a jury, a judgment for the defendant, from which error was prosecuted to this court.

Mr. C. S. WILSON, for plaintiff in error.

No appearance for defendant in error.

REED, J., delivered the opinion of the court.

It is contended that section 3 of the amendatory act is not germane, not embraced in the title, and void under sec. 24, art. 5 of the state Constitution. The act is entitled "An Act to amend sec. 29 * * * and to repeal secs. 30, 31, 32, and 33 thereof, *and for other purposes.*" The last clause, "and for other purposes," may first be disposed of. It is in such connection meaningless, of no legal significance—conveys no idea of any legislative intention whatever.

It is said by Judge Cooley in his excellent work on Const. Lim. 175 (5th ed.): "The words, 'and for other purposes,' must be laid out of consideration. They express nothing, and amount to nothing as a compliance with this constitutional requirement. Nothing which the act could not embrace without them can be brought in by their aid." See *Ryerson v. Utley*, 16 Mich. 269; *Town of Fishkill v. Plank Road Co.*, 22 Barb. (N. Y.) 634; *St. Louis v. Tiefel*, 42 Mo. 578.

It will be observed that in the title the specific changes are designated, the amendment of sec. 29 and the repeal of the four enumerated sections. Had the act been entitled, generally, as an act to amend chap. 94, any amendment germane and pertinent might have been made; but being specifically limited to the sections designated the interpolation of a new and different section was not permissible. Any further changes than those designated, were precluded by the specific enumeration of those named. See *Woodson v. Murdock*, 22 Wall. 351; *State v. Bowers*, 14 Ind. 195.

In Cooley Const. Lim. 279 (5th ed.), it is said: "As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the

legislative intent as to what shall have operation ; it is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so." See *Mewhorter v. Rice*, 11 Ind. 199 ; *State v. Young*, 47 Ind. 150 ; *Jones v. Thompson*, 12 Bush (Ky.), 394 ; *State v. Kinsella*, 14 Minn. 524 ; *Ryerson v. Utley* (*supra*) ; *Fishkill v. Plank Road Co.* (*supra*).

The subject-matter of the new section was not germane to the act it was intended to amend. It is a penal statute imposing onerous duties and new responsibilities upon parties in no way legally connected with the administration of county affairs, an attempt to delegate to outsiders duties cast by law upon certain officials who were to receive the pay, and imposing a penalty of \$100 upon the parties who should refuse or decline to accept the responsibility and perform the services.

It is sufficient that the subject-matter introduced as an amendment was not germane. If, within the legislative power, it should have been the basis of a new act—could not be incorporated as an amendment.

The statute being penal and the action brought for the penalty for the refusal to comply with its provisions, strict and specific proof was required, as in criminal cases, to warrant a conviction. The evidence failed to make a case. The statute, if valid, required the appellee to furnish to the road overseer, when employing ten or more men, the names of those who are or *may be* liable to a road tax under the provisions of the chapter. There was proof that from 150 to 170 men were employed in the various mines of the defendant, that the mines where they were employed were outside of the limits of the city of Aspen. There was no proof that any of the employees of the defendant were liable to pay road tax, that any were between the ages of twenty-one and fifty, or that any of them resided outside the corporate limits of a city or town. The fact of being employed outside the city limits, fixed no residence ; every individual might have resided within the city. The prosecution must have shown that some of them were legally liable to a road tax, otherwise,

no violation of the statute could be established. The words of the statute are, "who are or *may be* liable," etc. The words "*may be*" can only be construed as meaning in the future, and impose an impossibility. How can any employer in the changes, shifting and mutations of miners, say who may be at any subsequent time liable to taxation at any particular place? If an attempt at compliance was made, those words would have to be disregarded. If, under the statute, the employer assumed the duties imposed, and at the end of ten days made his report, not one of those returned might be accessible when the overseer attempted to collect.

The statute is an indirect attempt to make an employer liable for the road tax of his employees, and in case he fails to respond to collect \$100 in lieu of the taxes. If the law is not invalid, it is and must remain of no value to achieve the end sought—is ineffectual, and is open to severe criticism.

The judgment of the county court must be affirmed.

Affirmed.

BENJAMIN, PLAINTIFF IN ERROR, v. MATTLER ET AL., DEFENDANTS IN ERROR.

1. AGENT.

An agent necessarily has a principal, and is bound to know who it is.

2. BROKER, LIABILITY.

An agent is liable in damages in all cases where he falsely affirms that he has authority, as he does when he signs the instrument as agent of his principal, knowing that he has no authority. He undertakes for the truth of his representation.

3. PLEADING—STATUTE OF FRAUDS.

The statute of frauds, if relied upon in defense, must be specially pleaded.

Error to the District Court of Arapahoe County.

DEFENDANTS in error, John Mattler, W. L. Beardsley, William W. Watson and W. C. Mead, partners doing busi-

ness as real estate agents in the city of Denver, made the following memorandum or contract in writing, and delivered it to the plaintiff in error:

“DENVER, Colo., Oct. 23, 188 .

“Received of Darius R. Benjamin the sum of two hundred dollars as part payment for the following described real estate, to-wit: Lots one (1), and two (2) in block twenty-one (21), Hartman's Addition to the City of Denver. The entire price to be paid for said above described real estate is \$3,400 (thirty-four hundred dollars), and is to be paid as follows: $\frac{1}{3}$ cash, $\frac{1}{3}$ in one year, and $\frac{1}{3}$ in two years. Title to be perfect, and good and sufficient warranty deed to be executed and delivered by the said W. A. Pratt to Darius R. Benjamin, his heirs or assigns, on or before the third day of November, 1888, together with an abstract showing clear title. Provided however, that the payment of \$933.33 is tendered or paid at said date. If the said payment of \$933.33 is not tendered on or before the said 3d day of November, 1888, then this contract is to be void and of no effect, and both parties released from all obligations herein, and in that event, the said two hundred dollars paid on this date is to be held by W. A. Pratt as liquidated damages.

“ (Signed) • JOHN MATTLER & Co.,
“ Agt's for Owners.”

Plaintiff tendered full performance under the contract. Defendants failed and refused to fulfill the contract; the sale was not perfected, and plaintiff brought suit for damages for nonperformance.

It appears by the complaint that, before bringing suit against the defendants, the plaintiff brought suits for specific performance, one against Nellie Carpenter and one against Eva Wiley, each of whom was the owner individually of one of the lots; in both of which plaintiff was beaten and the suits dismissed, it appearing upon the trial, conclusively, that the defendants had never been appointed the agent of either, or been given authority to sell the property. The damages claimed by plaintiff against the defendants for the breach of

the contract were costs paid in the suits against Carpenter and Wiley, \$49.63, attorney's fees in prosecuting the suits, \$100, recording contract, \$1.00, his own loss of time and trouble in attending to the suits, \$200, damages on failure to get the property, \$3,000 ; total \$3,350.65. The defendants answered generally, denying the allegations of the complaint, and specially as follows :

“ For a further and second defense to the cause of action in the complaint alleged, these defendants say that heretofore, to wit, on the 23d day of October, 1888, as agents, for Eva L. Wiley and Nellie P. Carpenter, the defendants entered into a contract with the plaintiff of the tenor following, to wit: ”

“ That at the time the defendants entered into said contract with the plaintiff they did not have, nor did they at any time have, authority in writing from the said Eva L. Wiley or Nellie P. Carpenter, or either of them, to enter into the same.

“ The defendant for a third defense says that at the time they entered into the contract in the second defense set out with the plaintiff, the title to the said lots one and two in block twenty-one, Hartman's addition to the city of Denver, county of Arapahoe and state of Colorado, stood in the names of Eva L. Wiley and Nellie P. Carpenter, upon the records of said Arapahoe county, kept on file in the office of the clerk and recorder in said county for the recording of deeds to real property. That the plaintiff had the same access to, and knowledge of the contents of such records as was possessed by the defendants. That the said Eva. L. Wiley and Nellie P. Carpenter at the time lived in the state of Illinois. That Dr. W. A. Pratt, of Elgin, Illinois, was and is a brother of said Eva L. Wiley and Nellie P. Carpenter. That the said Dr. W. A. Pratt listed said property with the defendants, as real estate brokers, for sale. That on, to wit, September 19, 1888, the said W. A. Pratt wrote to defendants that said lots one and two above described were for sale.

“ That believing that the said W. A. Pratt had authority

for his two sisters, the said Eva L. Wiley and Nellie P. Carpenter, to sell the same, the defendants, without concealing their authority in the premises, in good faith entered into the contract with the plaintiff set out in the second defense, after informing him of the authority that they possessed as such agents to make such contract. That, at the time the said contract was entered into, the plaintiff possessed all the information relative to the authority of the defendants to enter into the same possessed by the defendants themselves.

“That after the making of the said contract of sale the defendants did all in their power to induce the said Eva L. Wiley and Nellie P. Carpenter to convey the said real estate therein described to the plaintiff, but their failure to so convey and so comply with the said contract was through no fault whatever of these defendants. That upon the refusal of the said Eva L. Wiley and Nellie P. Carpenter to convey the said lots in accordance with the provisions of the said contract, the defendants returned to the plaintiff the sum of two hundred dollars theretofore paid them as a part of the purchase price of said lots, together with interest thereon at the rate of ten per cent per annum during the time the same was in their hands. (There was another special defense, numbered four, which is not involved, as a demurrer was sustained to it.) To these special defenses a general demurrer was filed, in substance, that the matters stated did not constitute a defense. The demurrer was overruled as to the second and third, and sustained as to the fourth. Judgment was entered for the defendants on the pleadings and the suit dismissed.

Messrs. HOUZE & WILLSEA, for plaintiff in error.

Mr. D. V. BURNS, for defendants in error.

REED, J., delivered the opinion of the court.

The suit was brought to recover damages alleged to have

been sustained by the plaintiff by the wrongful acts of the defendants. It is in the nature of an action on the case at common law for deceit. The nature of the action is plain and unmistakable. The allegation in the complaint is, "the defendants willfully and falsely represented to the plaintiff, that they, the defendants, were the agents of the owner of the following land, * * * and that as such agents, the defendants had lawful authority to sell and make contracts of the sale of the said lots of land to the plaintiff at and for the price and on the terms following, to wit:—"That the plaintiff, relying upon such representations, purchased the lots from the defendants and made a payment of \$200; and, in substance and effect, that defendants were not the agents of the owners of the property; that they had no authority whatever to contract a sale or sell the property; that the lots were not owned by the party represented by the defendants as the owner and on whose behalf they assumed to contract, but by other and different parties; their refusal and inability to comply with their contract, and a statement of damage by the plaintiff by reason of the wrongful acts of the defendants.

These allegations state a clear and unquestionable cause of action. The nature of the action appears to have been misconstrued or misunderstood, and probably quite naturally, by plaintiffs embodying in the complaint a copy of the contract in writing executed by the defendants. It seems to have been regarded as an action based upon the contract or growing out of it. On this error much of the argument of defendants is based; while, in fact, the contract in question can legally only be regarded as a part of the evidence of the plaintiff necessary to make his case. Technically, setting it out in the complaint was bad pleading.

The first defense is a general denial of all the allegations in the complaint, including the making and delivering of the instrument in writing, which certainly could not have been intended; for, in the first paragraph of the special defense following, the making of the contract is admitted, and a full copy of it incorporated.

One allegation of such paragraph should not pass unnoticed. It is said, "as agents for Eva L. Wiley and Nellie P. Carpenter, the defendants entered into a contract with the plaintiff." This contradicts the contract as set out and made a part of their answer. Instead of entering into the contract as the agents of Wiley and Carpenter as alleged, the contract shows them to have been acting as agents of one W. A. Pratt,—the language of the contract being, "*Title to be perfect and good and sufficient warranty deed to be executed and delivered by the said W. A. Pratt.*"

The special defenses (two and three) are certainly peculiar. They were demurred to because the facts stated constituted no defense. They certainly fail to traverse any allegation in the complaint or interpose any bar to recovery; they appear to be more in the nature of attempted pleas in "confession and avoidance," confessing the facts as alleged, but setting up no legal defense in avoidance.

The contract whereby they represent themselves as the agents of Pratt as owner, and as having authority from him to sell, and to bind him to a contract of sale in writing, is admitted; that he was not the owner was admitted; also, that two other individuals, in no way connected with the transaction, and from whom they had no agency or authority whatever, were the owners. These admissions establish every important allegation in the complaint, and, unless they are avoided by subsequent matter, are conclusive. What are the supposed defenses? In the second there are none at all. In the third,—first, that record title to the property was in Wiley and Carpenter as shown by the county records, to which the plaintiff had the same access as the defendants. Admit it, and how does it operate as a defense? The defendants were representing themselves as the agents for the same of that specific property for the owner or owners, claiming and exercising authority to bind the owner by an instrument in writing, in which they agree not only that the owner shall convey clear title by deed, but that they will furnish an abstract showing a clear title. As agents, they must have had a principal, an

owner of the property sold, and should have known who it was. To say they did not know their own principal, nor in whom the title stood, and that the plaintiff could have found out by going to the records, as well as they, was no defense, and if of any legal bearing, supported the allegations of the complaint, that "they willfully and falsely represented * * * that they were the agents of the owners." The agents were legally supposed to know—it was their duty to know. No such duty was imposed upon the plaintiff, nor was he expected to know until the abstract, which was never furnished, should be examined. Then follow assertions of good faith, good and honest intentions, and an earnest effort to get the owners to make the sale, and their refusal. Admit it, and the facts stated neither traverse nor avoid any allegation in the complaint, and interpose no defense whatever,—seem to be purely exculpatory.

Counsel for defendants in an able argument contends that under the authorities no action could be maintained; but the authorities cited and relied upon do not sustain him.

In *Smout v. Ilbury*, 10 Mee. & Wels. 1, it is said by Alderson, B.: "There is no doubt of the personal liability of the agent in all cases where he falsely affirms that he has authority, as he does when he signs the instrument as agent of his principal, and knows that he has no authority;" again, "if a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him and the contract becomes void for want of such authority, the damage is the same to the party who confided in such representation, whether party making it acted with a knowledge of its falsity or not. In short he undertakes for the truth of his representation;" again, "first, when he has no authority and knows it, but nevertheless makes the contract as having such authority, in that case, on the plainest principles of justice, he is liable, for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge.

In *Hall v. Lauderdale*, 46 N. Y. 75, cited and relied upon by counsel, it is said: "The rule that the agent is liable when he acts without authority, is founded upon the supposition that there has been some wrong or omission on his part, either in misrepresenting or in affirming, or concealing the authority under which he assumes to act."

Viewed in the light of these authorities, the pleadings show a good cause of action.

It is ably urged in argument that no action could be maintained for the reason that the contract or memorandum executed by the defendants was void under the statute of frauds. It is said, "If the contract as made was not one the law would enforce against the principal, if it had been authorized by him, there is no liability on the part of the agent." There is no question in regard to the correctness of this principle in a case where the action is based upon the contract and specific performance is sought, or damage for failure to perform, but in this case it has no application. The assumed agents had no principal—no authority. The action is based upon the misrepresentations and assumption of authority to the injury of the plaintiff. The action is not based upon the contract, but upon the wrongful and false assumption of authority to make it. The action, before the code at common law, is an action for deceit—a "special action on the case."

See *Polhill v. Walter*, 3 Barn. & Ad. 114, and the nature of the action remains the same under the code, and, as said above, the contract is only evidence to establish the wrongs complained of, consequently, whether valid or void under the statute of frauds, is a question of no importance. It certainly would be competent evidence of the claim of agency and authority by the defendants, deceiving and misleading the plaintiff. Of the correctness of this conclusion I am very confident, but, if incorrect, there is another conclusive reason why the contention cannot prevail in this case. The judgment is upon the pleadings, and it is only to them that we can look to determine its correctness. The statute of frauds is not pleaded, the question is only presented in argument. If, as

supposed by counsel, the contract was the basis of the suit, and plaintiff's right to recover depended upon its validity—the contract being set out in the complaint at length and its execution being fully admitted in the answer—the statute of frauds should have been specially pleaded, if relied upon in defense. Wood on Stat. of Frauds, § 538; 2 Reed Stat. of Frauds, § 520 *et seq.*; *School Trustees v. Wright*, 12 Ill. 441; *Chicago Co. v. Liddell*, 69 Ill. 640; *Anter v. Miller*, 18 Iowa, 410; *Middlesex Co. v. Osgood*, 4 Gray (Mass.), 447. In England, see *Cotting v. King*, L. R. 5 Ch. Div. 660.

The plea of the statute of frauds is a personal privilege. If not pleaded it will be regarded as waived. *McCoy v. Williams*, 6 Ill. 584; *Chi. Dock Co. v. Kinzie*, 49 Ill. 289; *Rickards v. Cunningham*, 10 Neb. 417.

For these reasons we think the court erred in allowing judgment for the defendants upon the pleadings. The demurrers to the special pleas should have been sustained. No demurrer was interposed to the complaint, consequently, no question is raised in regard to the items of damage alleged. As defendants never claimed to represent Wiley and Carpenter or act for them in any manner, I do not see upon what theory costs, etc., of volunteer suits against them could be made the basis of an action for damages against the defendants, but, as the question is not raised, we express no conclusive opinion upon it.

The judgment will be reversed and the cause remanded.

Reversed.

RICHMOND, P. J., concurs.

BISSELL, J. I assent to the reversal of the judgment. I concur only in that part of the opinion which is based on the necessity to plead the invalidity of the contract under the statute of frauds, if the defendant would escape liability for the deceit, because he was without written authority from the principal to negotiate or effect the sale of the lots contracted about.

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17	283
17	285
17	286
18	489

3	233
368	505
1378	425

MANDERS ET AL., APPELLANTS, v. CRAFT, APPELLEE.

1. PLEADING—REPETITION.

The code prohibits unnecessary repetition, but does not prohibit repetition entirely.

2. PLEADING—DISCRETION.

A motion to compel the plaintiff to elect upon which of two counts in a complaint for the same cause of action he will proceed, is addressed to the discretion of the court.

3. BROKER'S COMPENSATION.

An agent acting for both parties, for each without the knowledge of the other, can collect commissions from neither, but this rule is applicable only to agent *stricti juris*, and not to middlemen.

Appeal from the District Court of Arapahoe County.

Messrs. HARTZELL & PATTERSON, for appellants.

Mr. ELLERY STOWELL, for appellee.

REED, J., delivered the opinion of the court.

The action was brought by appellee to recover commissions alleged to have been earned as a real estate agent in the exchange of a ranch property in the vicinity of Ogden, Utah, for property in the town of Ogden. The case was tried to the court, resulting in a judgment for plaintiff for \$662.50, from which an appeal was taken.

Appellants contend, first, that the court erred in overruling defendants' motion to compel plaintiff to elect upon which of the two counts contained in the complaint he would proceed, second, that the testimony showed that appellee was employed by and received a commission from the other party which legally precluded him from recovery against the defendants. Both counts were for the same cause of action. The first, a *quantum meruit*, alleging the employment for which he was to receive a reasonable compensation, and that the services were worth \$712.50. The second, that the value of the prop-

erty sold was \$26,000, on which he was to receive a regular commission, and that such commission amounted to \$712.50. This may also be considered in the nature of a *quantum meruit*. No price was fixed that he was to receive for his services. The transaction was not a sale but an exchange, and it depended upon proof of a general custom and proof of the percentage—also, of the value of the properties exchanged. The contention is based upon sec. 49 of the Civil Code, as follows: "The complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language without unnecessary repetition."

In Mr. Boone's work upon Code Pleading, sec. 16, it is said: "The facts constituting each cause of action must be concisely stated, without unnecessary repetition. Counts in pleading, technically speaking, are entirely unknown to the code system, and the plaintiff is restricted to a single statement of his cause of action. Thus, a plaintiff is not allowed to set forth, in different counts, in his complaint, several distinct causes of action against the defendant for the same indebtedness. If the complaint contains but one cause of action, there can be but one statement of it. The facts cannot be subdivided so as to present, fictitiously, two or more causes of action."

In Bliss upon Code Pleading, sec. 119, occurs the following: "But it is generally required that the different statements of a complaint under the code should contain causes of action different in fact. The statute requires that the facts shall be stated without repetition, or unnecessary repetition. With a few exceptions, this requirement is held to forbid a duplicate statement, in different form, of the same cause, and if such statements are made, the plaintiff will be required to elect upon which to go to trial, or the court will strike out all but the first statement."

In Boone, the rule is stated much stronger than the decisions warrant. The words without "unnecessary repetition" would, of themselves, in many instances, modify the rule as stated. What is and was is not unnecessary repetition must,

of necessity, be determined by the court. The obvious intention of the system of code pleading is that it shall be more equitable than that of the common law. To so construe it as to render it more restrictive would defeat the intention. In *Bliss* it will be observed that the rule is considerably modified. The language is: "But it is generally required," showing that it is not regarded as arbitrary and mandatory, but that there are many exceptions, and this is supported by the context of sec. 119 and subsequent sections.

In *Plummer v. Mold*, 22 Minn. 16, it was said: "On the trial the court required the plaintiffs to elect whether they would rely upon the special contract alleged in the complaint or the value alleged. In *Hawley v. Wilkinson*, 18 Minn. 525, this was held to be in the sound discretion of the court, and we adhere to the rule there laid down." See also *Birdseye v. Smith*, 32 Barb. 217; *Snyder v. Snyder*, 25 Ind. 399; *Stearns v. Du Bois*, 55 Ind. 257; *Whitney v. Chi. & N. W. R. Co.*, 27 Wis. 327.

The statute prohibits unnecessary repetition, but does not prohibit repetition entirely. *Jones v. Palmer*, 1 Abb. Prac. Rep. 442; *Pearson v. Mil. & St. P. R. Co.*, 45 Iowa, 497.

There may be, and undoubtedly are, many cases where the party should be required to elect, where one count is a *quantum meruit*, and the other of a specific contract to pay a certain sum designated, both should not stand. There are also many cases where the arbitrary application of the rule would prevent justice. It would seem, that to leave to the discretion of the court to determine whether or not the repetition is unnecessary is the better interpretation of the law. In this case it cannot be said that the discretion was abused; hence, no error was committed in refusing the motion.

The second contention cannot be sustained. It is true, and the rule of law is well settled, that an agent acting for both parties, for each without the knowledge of the other, can collect commissions from neither, and it rests upon a principle of sound public policy, that the party cannot be at the same time both seller and purchaser—the duties are in-

compatible. It is the object of the seller to get all he can, of the purchaser to buy as cheaply as possible. But this rule is only applicable to agents *stricti juris*, not to middlemen. *Finnerty v. Fritz*, 5 Colo. 176; *Stewart v. Mather*, 32 Wis. 344; *Shepherd v. Heddin*, 29 N. J. L. 334; *Mullen v. Keitzleb*, 7 Bush. (Ky.) 253; *Anderson v. Weiser*, 24 Iowa, 430; *Merriman v. David*, 31 Ill. 404.

In this case there was, technically, no purchase or sale; no money passed. It was an exchange of one kind of real estate for another. With the prices, details and trade the agent had nothing to do, and the arrangement was that he should not have. His sole action and employment terminated with bringing the parties together, which he did. The trade was made by the principals, consequently, the agent is not obnoxious to the charge of double employment under the law. There was nothing in the relation of the agent to either to prevent compensation from both, if both agreed to pay. That they did is found as a fact by the trial court, and although the evidence was rather unsatisfactory and conflicting, we do not feel at liberty to question the finding.

The judgment will be affirmed.

Affirmed.

CHURCH ET AL., PLAINTIFFS IN ERROR, v. EGGLESTON
ET AL., DEFENDANTS IN ERROR.

1. ADMINISTRATORS—COSTS.

Administrators are not chargeable with the costs incurred in a controversy between persons claiming to be distributees of the estate when there is nothing to show that they precipitated the contest, or in any way exceeded, in their official capacity, the limit of their duties.

2. COSTS IN EQUITY.

While the chancellor is allowed great discretion in adjudging costs, such discretion can only be exercised within well defined limits.

Error to the District Court of Boulder County.

IN January, 1887, John Leonard died a bachelor and intestate in the county of Boulder at an advanced age, probably born in 1812, consequently, was at the time of his death about seventy-five years old. He left property estimated at from \$125,000 to \$150,000. There resided in the immediate vicinity of his place of death two nephews, John and Henry Church, sons of his sister, Mary Church, who took out letters of administration on his estate.

John Leonard was the son of Edward and Elizabeth Leonard, who were married in Ireland, and had born to them before immigrating to America, William, probably born about 1804, Mary, afterwards Mrs. Church and mother of administrators, born about 1809, and John Leonard, born about 1812. In 1814 the family came to America and settled at Prescott, Canada. In the same year a daughter Ann was born, but whether in Ireland or America does not appear. She died at an early age, leaving no children. There was also born to the mother at some subsequent time, indefinitely determined, another son, Thomas Jefferson Leonard. At the time the testimony was taken in this case, 1888-9, Mrs. Church was the only living child, and she gave her age as seventy-nine.

William Leonard left one child, Mary, who became the wife of Orlando Bond.

Thomas J. Leonard died at Washington, D. C., in 1869, leaving two children, George H. Leonard and Mrs. Nellie Eggleston, petitioners in this proceeding.

Mrs. Mary Church, sister of John Leonard, was an heir, and it was conceded that the family of Orlando Bond, whose wife was the daughter of William Leonard, were entitled to share in the estate. This controversy arose as to the children of Thomas J. Leonard, the petitioners. Shortly after the death of John Leonard, Mrs. Mary Church asserted that Thomas J. was not her brother and the brother of John Leonard, but was the illegitimate son of her mother, Elizabeth, by an Irish tailor named Patrick Nolan, with whom her mother lived without marriage; that he, Thomas J., was born at some indefinite time and at some indefinite place some

years after the death of her husband, Edward Leonard. In the settlement of the estate by John and Henry Church, as administrators, the claims of the petitioners as distributees were disregarded. A petition was filed in the county court setting up the relationship and praying the recognition of the parties as heirs. The administrators, John and George Henry Church, answered, averring, on information and belief, that Mary Church, Amanda Wells, Anna Smith and Earl C. Bond, the three latter grandchildren of William Leonard, were the only heirs. A citation issued to the respective claimants, service was had by publication, Mary Church filed an answer identical with that filed by her sons, the administrators, except that it was not on information and belief, averring that she and the three grandchildren of William Leonard were the only heirs; that Thomas Leonard was not a brother of John Leonard, and that his children, the petitioners, were not heirs. Earl C. Bond, Mrs. Amanda Wells and Anna Smith answered, admitting that Thomas Leonard and John Leonard were brothers and that the petitioners were heirs of John Leonard. The issues were tried to a jury, resulting in the following verdict: "We, your jury, in answer to the question, 'Was Thomas J. Leonard the son of Edward Leonard by his wife, Elizabeth Leonard?' say, yes." From such finding an appeal was taken to the district court, where it was tried to Hon. John Campbell, judge, without a jury, resulting in the same finding as in the county court, from which error was prosecuted to this court.

Messrs. ROGERS, SHAFROTH & WALLING, for plaintiffs in error.

Mr. R. D. THOMPSON and Mr. T. M. PATTERSON, for defendants in error.

REED, J., delivered the opinion of the court.

No error of law is urged as ground of reversal; the sole

contention is that the judgment of the district court is not warranted by the evidence. But one question of fact was to be determined,—whether Thomas Jefferson Leonard was the son of Edward and Elizabeth Leonard and brother of John Leonard, deceased, George H. Leonard and Mrs. Eggleston, the petitioners, being son and daughter of Thomas. Thomas was alleged by respondents to have been born to Elizabeth out of wedlock long subsequent to the death of her husband, Edward. This claim was so ably urged, as being established by the evidence, that, contrary to the usual practice, this court has not only carefully examined the record, but the immense mass of evidence, mostly depositions, used upon the trial.

The case was first ably and carefully tried to a jury in the county court, and a verdict found for the petitioners. The administrators took an appeal to the district court, where the case was again ably tried, resulting in the affirmance of the verdict of the jury. The learned judge of the district court, in an able opinion, reviews, analyzes and examines the entire evidence and finds that the petitioners, descendants of Thomas Leonard, were entitled to one third of the estate of John Leonard. That the Bonds, descendants of William Leonard, were entitled to one third and Mrs. Mary Church to one third.

We think the finding and decree were warranted by the evidence. The evidence is conflicting to a certain extent, but the evidence in support of the illegitimacy of Thomas Leonard is vague, undeterminate and inconclusive, based upon rumor, and dependent upon the memories, guesses and suppositions of extremely old people upon facts that occurred in their youth, and is very unsatisfactory, not sufficient to overcome the legal presumption of legitimacy. Besides, there are facts disclosed in regard to the manner in which it was obtained, which, if not sufficient to cause it to be rejected, are certainly sufficient to cast doubt and discredit upon it.

The finding of the district court as to the facts submitted

and the decree in regard to the distribution of the estate of John Leonard will be affirmed.

The costs of the litigation were, by the decree of the district court, to be taxed against the administrators. It is contended that this was erroneous. The plain inference from the language used is that they are not to be paid out of the estate nor out of any distributive portion of the estate, but by the administrators from their own resources.

If such is the construction, the decree is evidently erroneous. In this proceeding the administrators are to be regarded only in their official capacity as agents and trustees in the distribution of the estate. Their relation to the estate as sons of Mrs. Church is to be ignored and disregarded. They, as administrators, were legally bound to make a proper distribution to those entitled to share. The right of the children of Thomas to share in the estate was challenged by Mary Church. Until the contest was adjusted the administrators could make no settlement or distribution. There is nothing to show that they precipitated the contest, were responsible for it, or in any way exceeded in their official capacity the strict and honorable limit of their duties. If this view is correct, no reason exists for charging them with costs; the judgment against the administrators must be reversed. Nor should the costs be taxed against the estate as a whole—the Bond family were in no way responsible for it and should not be taxed. The family of Thomas Leonard were, when challenged, compelled to intervene, and, having been successful in establishing their right, no reason can be shown for assessing them with costs. The county court in the distribution of the estate will no doubt assess the costs correctly. The proceeding is purely in equity, and, while the chancellor is allowed great discretion in adjudging costs, such discretion can only be exercised within well defined limits. 2 Dan. Ch. Pl. & Prac. (4th ed.) 1376, 1377. “*Victus victori in expensis condemnatus est*” is the general rule in the court of chancery, as well as at law; it was also a maxim of the civil law. 2 Dan. Ch. Pl. & Prac. (4th ed.) 1381; *Vancouver v. Bliss*,

11 Ves. Jun. 458; *Staines v. Morris*, 1 Ves. & B. 8; *Millington v. Fox*, 3 Myl. & Cr. 388; *Saunders v. Frost*, 5 Pick. (Mass.) 508; *Clark v. Reed*, 11 Pick. 446; *Lee v. Pindle*, 12 Gill & J. (Md.) 288; *Tomlinson v. Ward*, 2 Conn. 396.

We can see nothing in this case to take it out of the general and well settled rule. The decree of the district court in finding the petitioners entitled in the distribution to one third of the estate of John Leonard will be affirmed. That part of the decree charging the administrators with costs will be reversed. The cause will be remanded to the district court of Boulder county.

Affirmed, except as to costs.

THE SAN LUIS LAND, CANAL & IMPROVEMENT COMPANY,
APPELLANT, v. THE KENILWORTH CANAL COMPANY,
APPELLEE.

1. EMINENT DOMAIN—CORPORATE PROPERTY.

The statute contemplates the institution of condemnation proceedings by one corporation against another, as well as by a corporation of a public character against the property of a private individual.

2. CONSTITUTIONAL LAW.

The provision in the eminent domain act for preliminary possession and use of the property pending condemnation proceedings is not unconstitutional.

3. STATUTORY CONSTRUCTION.

The provisions of section 1716, Gen. Stats., that no tract of improved or occupied land shall, without the written consent of the owner, be subjected to the burden of two or more irrigating ditches, when, etc., are for the benefit of the landowner, and cannot be invoked by rival ditch companies.

4. DECREE, FORM OF.

The decree or rule entered in this case is in accordance with the spirit and letter of the statute.

Appeal from the District Court of Rio Grande County.

Messrs. HOLBROOK & BROWN, Mr. F. B. WEBSTER, Mr. C. M. Campbell and Mr. F. C. Goudy, for appellant.

Mr. GEORGE ESTES, Mr. C. A. JOHNSON and Messrs. MCINTIRE & McDONALD, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

This action was commenced in the district court of Rio Grande county by the Kenilworth Canal Company against the San Luis Land, Canal & Improvement Company, for the condemnation of the right of way for a canal through a certain tract of land, containing about fifty-six acres, situate on the Rio Grande river. The petition was presented to the judge of the court in vacation and by him set down for hearing at the succeeding term of the court. Thereafter the petitioner applied to the court for permission to enter upon the land and proceed with the construction of their canal, which permission was granted upon a deposit being made of \$250. Motion was made by the defendant company to vacate this order, which was denied. Answer was subsequently filed and motion interposed for judgment upon the pleadings by the defendant company; this also was overruled. The commissioners were duly appointed to review the premises, evidence was taken, and resulted in a judgment favorable to the petitioner. The total damages were fixed at \$202.50.

Several errors are assigned why this judgment should be reversed and we will take them up in the order of their presentation by appellant. But before doing so we will say that, so far as the proceedings are concerned, they appear to have been strictly in conformity with the provisions of the act entitled "Eminent Domain."

By section 238 of chapter 21, Code, General Laws of 1888, it is provided, "That in all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any railroad, public road, toll road, ditch, bridge, ferry, telegraph, flume or other public or private work or improvement, or which may damage property not actually taken, has been heretofore or shall hereafter be conferred by general law or special charter, upon

any corporate or municipal authority, public body, officer or agent, person or persons, commissioner, or corporation, and the compensation to be paid for, or in respect of the property sought to be appropriated or damaged, for the purposes above mentioned, cannot be agreed upon by the parties interested, * * * it shall be lawful for the party authorized to take or damage the property so required, or to construct, operate, and maintain any railroad, public road, toll road, ditch, bridge, ferry, telegraph, flume or other public or private work or improvement, to apply to the judge of the district or county court, either in term time or vacation, where the said property or any part thereof is situate, by filing with the clerk a petition, setting forth by reference his or their authority in the premises; the purpose for which said property is sought to be taken or damaged; a description of the property, the names of all persons interested therein as owners or otherwise, as appearing of record, if known, or if not known, stating that fact and praying such judge to cause the compensation to be paid to the owner to be assessed." * * *

Under the provisions of this section and the succeeding sections of the act, these proceedings were instituted, and by the petition it is recited that both the petitioner and the defendant company are corporations duly existing under and by virtue of the laws of the state of Colorado. And we have no doubt but that the section contemplates the institution of such proceedings by one corporation against another as well as by a corporation of a public character against the property of a private individual.

The first assignment of error is based upon the refusal of the judge to set aside and vacate the order granting permission to the plaintiff company to enter upon the land before final hearing. And in support of this contention, our attention is called to art. 2 of section 15 of the constitution which provides: "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury,

when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested."

We cannot see how counsel for appellant can seriously insist that this provision of the constitution prohibits the judge of the court, or the court, from making an order permitting the petitioner to enter upon the land pending the proceedings, upon the petitioner's depositing what in the judgment of the judge or court is a sufficient sum to compensate the party for damages that may result to him. Especially so in view of the provisions of section 243 of the said act, which clearly contemplates that such order may be entered, and especially so when it is known that this practice has most universally obtained in proceedings instituted under the provisions of this act. The right to do so has been recognized by the district courts and by the supreme court of this state. In *McClain v. The People*, 9 Colo. 190, this question has been determined. Therefore it is useless for us to further consider it.

The second assignment of error is that the defendant should have been allowed to show that its canal was built for the purpose of irrigating and of sufficient capacity to irrigate all the lands proposed to be irrigated by the then proposed canal. And in support of this position our attention is called to sections 1716-1718 General Statutes of Colorado, 1883, wherein it is provided: "That no tract or parcel of improved or occupied land in this estate, shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

We are wholly unable to understand how it can be urged that the defendant company has any right under the provis-

ions of these sections. They clearly and in unmistakable language apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act.

It is also contended that because the contemplated canal of the petitioner was parallel for many miles with the canal of the defendant company, and therefore greatly damaged it, that the right to these proceedings did not exist. This contention is without support in law or reason. No authorities are presented which intimate that the construction of one canal is sufficient reason to prohibit the construction of another because it runs parallel with the first. If that rule would obtain it would result in the creation and continuation of a monopoly against which the constitution of our state and the statutes are directly aimed. And even if there were no provisions of the constitution and statute, no court has yet held or would hold that such contention should prevail.

“While the legislature may not repeal or materially modify the charter of a corporation, unless the power is reserved, the property of the corporation is subject to condemnation for public uses. The taking of the property of a corporation is not an alteration, modification, or repeal of its charter. It is the enforced purchase of its property. The banking house of a bank, the bridge of a bridge company, the grounds of an academy, may be taken, as well as the property of an individual. The property is held subject to the necessities of the public. The franchise and the property, when inseparable, can be taken together, compensation being made for both. The property of a corporation, not actually in use or absolutely necessary for the enjoyment of the franchise, or which is only convenient, and not such as the corporation might condemn, and which they had acquired by purchase, is subject to condemnation for other purposes, as the property of an individual.” Mills on Eminent Domain, § 41. *Peoria, Pekin & Jacksonville R. R. Co. v. Peoria & Springfield R.*

R. Co. 66 Ill. 174; *White River Turnpike Co. v. Vermont Central R. R. Co.* 21 Vt. 590; *Trustees of Belfast Academy v. Salmond*, 11 Me. 109; *The Jeffersonville M. & I. Co. v. Daugherty*, 40 Ind. 88.

These authorities we think dispose of this alleged error.

It is further complained that the decree of the court is erroneous in this, that the court had no right or authority to vest in the plaintiff the seizin of the lands of defendant sought to be condemned, nor any greater interest than a license therein. We have carefully read the decree of the court and we do not understand that it goes so far as to confer upon the petitioner any greater right than that contemplated by the eminent domain act. After describing the lands sought, the decree says that the same are hereby vested in the said Kenilworth Canal Company for the use and purposes set forth and specified in the plaintiff's petition, viz: "That of building, having and maintaining thereon an irrigating ditch or canal for the purpose of supplying and carrying water from said Rio Grande del Norte river to lands lying below the same, and that for said purposes, said The Kenilworth Canal be seized of said lands, and is authorized to take and have possession thereof, and hold and use the same for purposes specified herein and in said petition."

Under this decree there can be no contention that the court has gone beyond the authority expressly conferred upon it by the statute; that it has given any greater right than was absolutely necessary for the purposes for which the land was sought to be condemned. In fact we think the court has followed the spirit and expressed letter of the statute wherein it is provided, that after due proof the verdict of the jury and the deposit of the compensation in court or with the clerk of the court, the court "shall make and cause to be entered in its minutes, a rule, describing such lands, real estate or claims in manner aforesaid, such ascertainment of compensation, with the mode of making it, and each payment or deposit of the compensation aforesaid, a certified copy of which shall be recorded and indexed in the recorder's office of the proper

county, in like manner and with like effect as if it were a deed of conveyance from the said owners and parties interested, to the proper parties. Upon the entry of such rule the said petitioner shall become seized in fee except as hereinafter provided of all such lands, real estate or claim described in said rule, as required to be taken as aforesaid, and may take possession of, and hold and use the same for the purposes specified in said petition." Section 242, chapter 21, Code, General Laws, 1883.

It is also insisted that the damages are inadequate. To this we think it sufficient to say, that there is ample testimony to warrant the decree. The report of the commissioners and the testimony taken before the court satisfy us that the amount was amply sufficient to compensate the defendant company for the land taken. The proceedings were regular, the right of the petitioner to construct the canal parallel with that of the defendant company cannot be questioned. The judgment of the court is in conformity with the provisions of the statute, and the damages allowed ample compensation for the land taken.

We find no error in the proceedings which would warrant a reversal of the judgment.

The judgment must be affirmed.

Affirmed.

HULBERT, ADM'X. ETC., APPELLANT, v. WALLEY, APPELLEE.

1. ADMINISTRATION—FUNERAL EXPENSES.

The estate of a deceased person is responsible for funeral expenses.

2. SAME.

The failure of the administrator to inventory the property belonging to the estate of the decedent, does not render him or his estate liable for the payment of the decedent's funeral expenses.

3. SAME.

A widow is not primarily responsible for the payment of a claim against the estate of her deceased husband.

Error to the County Court of Arapahoe County.

Mr. E. P. HARMON, for appellant.

Mr. S. W. SPANGLER and Mr. E. E. SCHLOSSER, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

Some time prior to April, 1888, Caleb S. Burdsal died intestate, and one Thomas E. Poole was appointed administrator of his estate. A claim was presented in the usual statutory form and manner against the estate by the appellee herein, J. J. Walley, for funeral expenses, amounting in the aggregate to \$265. It appears from the record that the administrator failed to find any property belonging to Burdsal, consequently no inventory was filed, and in fact nothing has been done of any moment so far as the questions presented in this case are concerned.

Thereafter Luzetta Burdsal, wife of Caleb Burdsal, died, and Elizabeth T. Hulbert was appointed administratrix of her estate, and in the inventory she has enumerated, as part of the estate, the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ Sec. 1, Township 5 South of Range 70, west of the 6th principal meridian, situate and being in the county of Jefferson, state of Colorado. By the inventory it appears that the title to this real estate stands on the record in the name of Caleb Burdsal, and it is recited should be transferred to Luzetta Burdsal or her heirs at the assessed valuation of \$400.

It further appears that Walley, after the allowance of his claim against the estate of Caleb Burdsal, filed the identical claim against the estate of Luzetta Burdsal, which upon hearing was allowed, and judgment against her estate thereupon rendered. To reverse this judgment Elizabeth T. Hulbert, administratrix, prosecutes this appeal.

The contention of appellant is that the estate of Luzetta Burdsal is not responsible for the funeral expenses of the husband. The contention of appellee is that Mrs. Burdsal contracted the debt, and that her estate was liable for the

amount of the claim, and that inasmuch as the administratrix is claiming property standing in the name of Caleb Burdsal they have a right to claim payment of this amount from Luzetta Burdsal's estate.

The question presented for our determination is certainly singular, and we must admit that there is some force in the position taken by appellee. Yet nevertheless we are unable to find warrant in law or in reason sufficiently potent to sustain the position assumed by them.

The universally accepted rule is that the estate of a deceased person is responsible for the funeral expenses and other debts. This being true, and it not appearing from the record that the estate of Caleb Burdsal was insolvent, the question of Luzetta Burdsal's responsibility should not arise. On the contrary, it is shown that notwithstanding the fact that the administrator of Caleb Burdsal's estate had failed to find property with which to liquidate the claim, that nevertheless property did exist, subsequently discovered, which could have been and should have been inventoried as a part of his estate, and out of which the claim in question could have been paid.

It is true that they have inventoried as a part of the estate of Luzetta Burdsal property standing in the name of Caleb Burdsal, and assert that the title should be in the name of Luzetta Burdsal, but how, whether as heirs of Caleb Burdsal or from any other cause or reason, we are not advised, and as the record stands, this real estate as well as certain personal property about which some indefinite testimony is given, belongs to the estate of Caleb Burdsal, and should be administered upon by the administrator of his estate, and made to pay his obligations including the bill of Walley. The mere fact of the administratrix of Luzetta Burdsal's estate asserting that this real estate is the property of Luzetta Burdsal does not make it so, and it was unquestionably the duty of the administrator of Caleb Burdsal to have inventoried and reported this real estate to the probate court when discovered, and petitioned for a sale of the same if the personal estate was insufficient to satisfy the debts of the deceased. Instead

of doing this the parties seek to make this an original claim against the estate of Luzetta, after having presented it against the estate of Caleb, to charge her personally with his burial expenses, on the theory that she had superintended and directed the preparation and disposition of the body. We do not think they are in a position to assert in the first instance that the estate of Caleb, which is by the record now shown to be solvent and amply sufficient to satisfy this claim, is responsible ; and prove the claim and have it allowed against his estate and thereafter withdraw it and make it in the nature of a personal claim against the estate of Luzetta his wife. If it was a claim against the estate of Caleb, out of whose estate the claim was bound to be paid, then the wife could not primarily be held responsible. One cannot deny and affirm at the same time, and the position thus taken by the appellee is inconsistent. Notwithstanding the conclusion we have reached, we are, nevertheless, inclined to the opinion that the claim is a just one, that it was properly allowed against the estate of Caleb Burdsal, and that the administrator and the parties interested should pursue his estate. Inasmuch as the administratrix of Luzetta Burdsal has set up a claim to property standing in the name of Caleb, we shall reverse the judgment without prejudice.

The judgment is reversed.

Reversed.

MITCHELL, APPELLANT, v. ARKELL, APPELLEE.

3	253
7	303
7	307

1. PUBLIC LAND—TOWN-SITE.

The title vested in the county judge by patent under § 2387 U. S. Rev. Stats., is only in trust for the occupants of the land. Occupancy of some sort must be shown as a condition precedent to obtain a conveyance.

2. REAL ACTIONS—LIEN FOR TAXES.

Where the plaintiff prevails in an action to recover land held by the defendant under a tax deed, the taxes paid thereon by the defendant

constitute a lien upon the premises, and it is error to adjudge the property to the plaintiff without decreeing the payment of the same with statutory interest.

Appeal from the County Court of Pitkin County.

Messrs. WILSON & STIMSON, for appellant.

No appearance for appellee.

RICHMOND, P. J., delivered the opinion of the court.

Appellee brought this suit to obtain possession of a lot in the city of Aspen, alleging in his complaint ownership in fee by a conveyance of December 1, 1887, from the judge of the county court, successor to a former county judge who had taken the title in trust from the U. S. government.

By acts of congress of 1867 and 1874, (U. S. Stat., § 2387) the judge of the county court is allowed "*to enter at the proper land office and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof according to their respective interests,*" etc. It would seem that the title vested in the judge of the county court only in trust for the occupants; hence, that some sort of occupancy was necessary as a condition precedent, to obtain a conveyance. No occupancy or improvement of any kind is shown, or any right whatever to the lot in controversy. It appears by undisputed evidence, that from and after June, 1884, August Ruff was in the possession, having a house partly upon the lot in controversy, and that he retained such possession, had it at the time of the trial, and that no other possession had ever been held. How, under such circumstances, a title could have passed to Arkell we are not informed. But the regularity of that proceeding does not appear to have been challenged, consequently, there is no question for review here.

Appellant claims the property in fee by virtue of tax title,

having paid the taxes from 1884 to 1889, both years inclusive, and having purchased it and received a deed from a tax sale by the county treasurer, also, by a purchase and quit claim from Ruff, who had the possession.

The evidence by the plaintiff, appellee, is inconclusive and unsatisfactory. The case upon the part of the plaintiff appears to have been loosely tried. The court found for the plaintiff, but upon what grounds does not appear, nor can we see how the conclusion could have been reached from the evidence. But it is impossible for this court, from the data presented, to review the case upon its merits.

One error is palpable and must cause a reversal,—whether or not the tax title was valid and superior to the title of the plaintiff. It appears to have been conceded that he (plaintiff) had never paid any taxes, and appellant had, during all the years mentioned. If plaintiff was found to have the title, such payment of taxes inured to his benefit, was an equitable lien upon the property, and it was error to adjudge the property to him without decreeing the payment of the taxes advanced, and the statutory interest.

Session Laws of 1885, p. 320; *Morris, et al. v. St. Louis Nat'l Bank*, 17 Colo. 231.

The judgment is reversed and the cause remanded.

Reversed.

THE FARMERS INDEPENDENT DITCH COMPANY, PLAINTIFF
IN ERROR, v. THE AGRICULTURAL DITCH COMPANY ET
AL., DEFENDANTS IN ERROR.

1. PLEADING—WATER RIGHTS.

A complaint by a ditch company for itself and on behalf of its stockholders and the users of water from its ditch, in an action to restrain the wrongful diversion of water, should state the names of the users of water, the date of their appropriations, the amount of land for which

the water is needed, and all facts necessary to show valid prior appropriations which have not been waived or abandoned.

2. PLEADINGS.

Facts and not conclusions of law should be pleaded.

3. DEGREE, WHEN NOT CONCLUSIVE.

An adjudication of the rights of an appropriator of water in a certain water district cannot conclude the rights of individuals who were not parties to the proceeding.

Error to the District Court of Jefferson County.

Messrs. THOMAS, BRYANT & LEE, and Mr. J. W. MCCREERY, for plaintiff in error.

Mr. C. J. HUGHES, Jr., for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

The plaintiff in error, The Farmers Independent Ditch Company, filed its complaint October 23, 1890, alleging: "Its existence as a corporation, and that for a long time last past it has been and now is in the lawful possession, control and management of that certain irrigating canal in Weld county, known as The Farmers Independent Ditch, and by virtue of such possession, control and management is required to carry and distribute, and has carried and distributed water from the Platte river, to its stockholders and others entitled to the use of the same, for irrigation and other beneficial purposes.

"That this suit is brought by plaintiff for itself and on behalf and for the use of its said stockholders in, and the users and consumers of water from said ditch. That the rights of plaintiff and the rights of its said stockholders, and the users and consumers of water for irrigation and other purposes as aforesaid, accrued to them and each of them, by reason of the construction of said canal, and the taking of water by the means thereof, from the Platte river, and the distribution and beneficial use of the same upon lands lying thereunder, at and of the date of November 20, '65, whereby an appro-

priation of the use of the water from the Platte river, was made and perfected according to the then existing laws of the land by and for the use of the consumers and users of water from said ditch. That the amount so taken, used and appropriated as aforesaid, as of the 20th day of November, 1865, is sixty-one and sixty one-hundredths cubic feet of water, standard measurement, per second of time; that the use of said amount has continued without interruption from the said 20th day of November, 1865, up to the present irrigating season of 1890, and until interfered with by the defendants hereinafter set forth, that said amount of sixty-one and sixty one-hundredths cubic feet is necessary to supply said users and consumers of water in the irrigation of their crops and in carrying on their agricultural operations upon the lands lying under and irrigated from said ditch, at all times during the irrigating seasons of the year.

“ That heretofore, to-wit, on the 28th day of April, A. D. 1883, a decree was entered in the district court of the county of Arapahoe, and in and for water district No. 2, which provided, *inter alia*, that the users and consumers of water for irrigation and other purposes, from the said, The Farmers Independent Ditch, were entitled to the priority of the use of the water not theretofore appropriated, flowing and to flow into the Platte river during the irrigating season each year, and to an amount not to exceed sixty-one and sixty one-hundredths cubic feet per second as of the date of November 20, 1865. * * *

“ That afterwards, to-wit, about the 21st day of December, 1874, the defendant, The Agricultural Ditch Company, and its predecessors in interest, built and constructed that certain ditch in Jefferson county known as The Agricultural Ditch, and thereby claim to have appropriated one hundred and one and $\frac{54}{100}$ cubic feet. That the said, The Agricultural Ditch, is taken from Clear creek in Jefferson county, that said stream known as Clear creek, is one of the main tributaries of the said Platte river aforesaid, and empties into the Platte river in the county of Arapahoe, state of Colorado,

and at a point in said river above the headgate of the said, The Farmers Independent Ditch. That the said alleged appropriation of the Agricultural Ditch, and its claim of right to the use of water, if any it has, is wholly subsequent and junior to the appropriation of the plaintiff company, and the users and consumers of water from its said ditch. That the waters flowing in said Clear creek, as well as in the other tributaries of the Platte river, are necessary to supply the said appropriation of the plaintiff, and others senior to it, and the use of the same belongs of right to said plaintiff, to the extent of its said appropriation, subject only to the rights of senior appropriations.

“That defendant, The Agricultural Ditch Company, has interfered with and taken the water flowing in Clear creek, appropriated as aforesaid by plaintiff, and has wrongfully turned and caused to be turned, the same into its said ditch, and so deprived plaintiff, and the users and consumers of water from its said ditch, of the waters so flowing through the said Clear creek into said river, and of its appropriation and use of the same for irrigation and other beneficial uses. That during the large part of the irrigating season of 1890, plaintiff has been illegally deprived of its said use of water and the benefits of its appropriation thereof, by means of said wrongful acts and doings of said defendant company, whereby the crops and agricultural products of the farmers and others as aforesaid, dependent on the water of the said, The Farmers Independent Ditch, have been in a large measure lost and destroyed. To its damage and the damage of users of water for its said ditch, for whom it sues, in the sum of fifty thousand dollars.

“That the said James P. Maxwell is state engineer, that said Isaac H. Batchellor is superintendent of irrigation for water district No. 1; that said J. G. Hartzell is water commissioner of water district No. 7. That they and each of them, have allowed and permitted the said, The Agricultural Ditch Company, to take and divert the waters flowing through Clear Creek into the Platte river, and appropriated by this plaintiff,

into the said, the ditch of The Agricultural Ditch Company, and have permitted the said, The Agricultural Ditch Company, without any right or authority of law whatsoever, to interfere with the rights and appropriations of plaintiff as aforesaid, to their great damage, as aforesaid.

“ That defendants are now taking and threatening to continue during the present irrigating season and further seasons, to take and use the water so appropriated as aforesaid, by plaintiff, and plaintiff has therefore no adequate remedy at law for the redress for such injury and damage ; that the result of said taking, and continued taking and use of water as aforesaid, in denial of the right of plaintiff, will result in irreparable and continuing damage and injury to plaintiff.”

Prayer for injunction and damages. To this the following demurrer was interposed.

“ 1. That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

“ 2. That said complaint does not state facts sufficient to entitle said plaintiff to the relief asked, or any relief whatever, against said defendant, either alone or jointly with the other defendants in said action.

“ 3. There is a defect of parties plaintiff in said complaint, in this, to wit : That the alleged stockholders and users of water through and from the ditch alleged to belong and to be in the possession of said plaintiff, are not joined with or made parties plaintiff in said suit.

“ 4. Because said complaint is uncertain and insufficient in this, to wit : That it does not state the facts showing the appropriation and continuous use by the said plaintiff and its alleged stockholders and consumers of the water, and the acts by means of which they acquired priorities attempted to be set up in said complaint.

“ 5. The said complaint does not state facts sufficient to constitute a cause of action against this defendant or against this defendant jointly with its co-defendants herein, in this, to wit : That it does not state facts sufficient to show that the said defendants, or any of them, were parties to or in any

manner affected or concluded by the alleged decree of priorities referred to and relied upon in said complaint.

"6. Because said complaint is uncertain, ambiguous and unintelligible, in this, to wit: That it fails to set up the whole of the alleged decrees mentioned therein, or a sufficient portion thereof, to show any right or rights thereunder accruing to the said plaintiff, or any binding force thereunder of the same against this defendant or any of the defendants herein.

"7. This court has not, and cannot have jurisdiction to inquire into, and determine the matters sought to be the subject of litigation in said complaint in this case, for the reason that as appears in and by said complaint there is now pending, and has been an adjudication concerning, the same subject-matter.

"8. That there is a defect of parties defendant in said suit, in this, to wit: That the parties using and consuming water in said district No. 7, are not joined with the other defendants herein.

"9. That there is a misjoinder of parties defendant herein, in this, to wit: That this defendant is improperly joined and united with the other defendants herein, to wit: James P. Maxwell, as state engineer; Isaac H. Batchellor, as superintendent of irrigation for water district No. 1; J. G. Hartzell, as water commissioner for district No. 7.

"10. And that said complaint is otherwise uncertain, unintelligible, and ambiguous, and insufficient to be answered unto by this defendant."

The demurrer was sustained and plaintiff elected to stand by the complaint, and prosecutes this error.

The only question for our consideration is whether or not the court erred in sustaining the demurrer. A determination of this question is not without difficulty. The increase in the agricultural interests of the state, the necessity for water to irrigate lands devoted to this purpose, and the scarcity of water in various of the streams in the state, renders it absolutely essential that caution should be exercised by the courts in reaching conclusions involving such rights. In our

opinion it is absolutely necessary that when one seeks to enforce an alleged right to the use of water as against others, that the complaint should contain every essential averment necessary to show the existence of such right under the provisions of the constitution of the state, the statutes and the various conclusions reached by the supreme court, wherein provisions are made and interpretations given concerning such right or rights.

In order that a thorough understanding of our conclusion may obtain, we have deemed it prudent to incorporate into the opinion the complaint and demurrer, believing a careful examination of them will make our position more intelligible.

In the case of *The Farmers' High Line Canal & Reservoir Co., et al. v. Southworth*, 13 Colo. 111, a similar question was presented for the consideration of the court. It is true, in that case there is seemingly a conflict of opinion between the justices then composing the bench, but we think sufficient can be gathered from each of the opinions to demonstrate the fact to be, that the demurrer to the complaint in this particular case was properly sustained. In the opinion of Justice Hayt, in commenting upon the case of *Thomas v. Guiraud*, 6 Colo. 533, and other cases, this language is used: "In the light of these decisions, it seems clear that, at least under some circumstances, different users of water, obtaining their supply through the same ditch, may have different priorities of right to the water; that the appropriations do not necessarily relate to the same time. * * * It is well established that no mere diversion of water from a stream will constitute the constitutional appropriation. To make it such it must be applied to some beneficial use, and in case of irrigation it must be actually applied to the land before the appropriation is complete."

Let us apply the principle thus announced to this complaint. It is alleged that the suit is brought by plaintiff for itself and on behalf and for the use of its said stockholders in, and the users and consumers of water from said ditch. The names of the stockholders are not mentioned, the number

is not given, the quantity of land owned by such stockholders is not set forth, the necessity for the quantity of water claimed to have been acquired by prior appropriations for the purpose of irrigation is not shown. It is averred in a general way. If, as is said, that under some circumstances different users of water, obtaining their supply through the same ditch, may have different priorities of right to the water, and that the appropriations do not necessarily relate to the same time, then, if the contention of plaintiff in error be correct, it should appear by averment in the complaint, that the Ditch Company as well as the consumers and stockholders, have a prior right to those of the defendant in error. It may be, and it can fairly be assumed to be true, that stockholders of the company at the time of the institution of this suit are not the same as those existing as early as 1865. They may be less, they may be more. Some of the land irrigated in the earlier day may have been abandoned, other lands may have been acquired along the line of the ditch subsequent to the admitted date when the Agricultural Ditch Company was incorporated. We are at a loss to see how the defendant company could have answered the complaint without supplying, by its answer, this defect of parties and details.

In the opinion of Justice Helm, he says: "The act of turning water from the carrier's canal into his lateral cannot be regarded as a diversion, within the meaning of the constitution; nor can this act of itself, when combined with the use, create a valid constitutional appropriation. There is therefore no escape from the conclusion hitherto announced by this court, that in cases like the present the carrier's diversion from the natural stream must unite with the consumer's use in order that there may be a complete appropriation within the meaning of our fundamental law."

If this be true, how can it be said that a general allegation that The Farmers Independent Ditch Company is entitled to the use of a certain quantity of water for the purpose of supplying its stockholders and users of water, or that the water so claimed is being appropriated for what is now understood

to be a beneficial use, to wit, irrigation of lands, is sufficient. If we understand this conclusion of Justice Helm, it means that the diversion of water from the natural stream by the Ditch Company does not constitute a constitutional appropriation, but that it must appear that the diversion must have united with it the consumer's use in order that there may be a complete appropriation.

If we are correct in this interpretation of the language, it certainly follows that the names of the individuals, the land to be served by the use of the water, must be set forth in the complaint in order that the defendant can properly and intelligently attack the claim of plaintiff. It is important to aver whether all of the water diverted from its natural channel by the Ditch Company is not so diverted for the purpose of irrigating the land of a few rather than many. In other words, we think that before a court can be called upon to enter a decree in conformity with the prayer of the complaint, the number of consumers who unite their use with the "carrier's diversion" must appear.

The mere fact that the Ditch Company has a decree within a certain district, for a certain amount of water, and its right to the use of that water, is by a certain decree declared to be prior to others in another district and further down or up the stream, does not, under the conclusion reached by all the justices constitute an appropriation for which a final decree could be entered. The names of the individuals, the date of their appropriations, the amount and quantity of land for which water is needed, must appear in order to show that the diversion and the consumption necessary to constitute the appropriation is prior to any rights acquired at any time by the defendant company.

By Justice Elliott, in his opinion, it is held that a general averment of priority to the use of water through the ditch of the defendant company for the irrigation of his lands antedating the priorities of the other defendants is not sufficient. That the complaint must contain an averment of the fact that the plaintiff has been accustomed to take and apply the

water without waiver, or abandonment, or at all, to the irrigation of his crops. *Coombs v. Agricultural Ditch Co.*, 17 Colo. 146.

It is a well recognized rule that a statement of legal conclusions does not constitute a cause of action. The facts upon which the cause of action is based must be stated. And we think that the complaint in this case comes clearly within the rule above recited. In other words, that the assertion of plaintiff's rights to the use of water is but a conclusion of law. Conceding that there was a decree of a court relative to the rights of the plaintiff company, so far as the appropriation of water was concerned in a certain district, yet such a decree cannot go so far as to conclude the rights of individuals who were not parties to that proceeding, and it is nowhere alleged or averred that the defendant company was ever made a party to the previous proceeding, nor is it shown by what means, by what facts or circumstances, they are precluded from using water from the Platte river or other stream tributary thereto by virtue of the decree.

We think that the complaint fails to state a cause of action. The demurrer was properly sustained. The judgment must be affirmed.

Affirmed.

ABBOTT, PLAINTIFF IN ERROR, v. SMITH ET AL., DEFENDANTS IN ERROR.

1. RESCISSION—EVIDENCE.

When a rescission of a prospecting partnership contract is relied upon, the circumstances must show an absolute abandonment of the contract as to future enterprises. Proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement.

2. PARTNERSHIP.

The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced and carried on, there is a partnership.

3. MINING PARTNERS—AGENCY.

A contract to engage in the business of prospecting for and developing mining property for the joint use of all, is in the nature of a partnership agreement, and under such an agreement, each party thereto becomes the agent of the other in prosecuting the joint adventure.

4. APPELLATE PRACTICE—INSUFFICIENCY OF EVIDENCE.

Where the verdict is clearly and manifestly against the evidence, it will be set aside in furtherance of justice.

5. SAME.

Where the evidence does not tend to support the finding, the judgment will be set aside as being against the evidence.

Error to the District Court of Chaffee County.

Messrs. LIBBY & MARTIN, for plaintiff in error.

Mr. G. K. HARTENSTEIN, for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

By the complaint in this case it is alleged that the plaintiff in error, Abbott, and the defendants in error, Smith and Creede, did, in the early part of the year 1885, enter into what is commonly understood as a prospecting partnership contract. Abbott and Smith were to contribute money and supplies, and Creede to prospect and locate and work mining claims; and the claims located were to be located and recorded in the names of Abbott, Smith and Creede jointly.

That on August 26, 1889, and while this contract was in force and effect, Smith and Creede discovered and located two mining claims called The Holy Moses and The Cliff.

That at the time of the discovery and location of these claims, Smith and Creede were using food and other supplies purchased with the partnership funds; that they neglected to include the name of Abbott in the discovery notice and recorded certificate of location, as one of the owners of the claim. On the contrary, they did include the name of E. R. Naylor. Since that time Smith, Creede and Naylor have sold the mining claims to the defendant in error, Moffat, for

the sum of \$70,000, and have received and divided among themselves \$11,000 of this sum; that a deed conveying the mining claims to Moffat is in escrow with The First National Bank of Salida, to be delivered to Moffat upon the deposit by him in said bank of the sum of \$55,000. The financial irresponsibility of Smith and Creede is set forth. The purpose of the suit is for an accounting and for a decree adjudging Abbott to be the owner of one third of the mining claims, subject to the right of Moffat to complete his purchase, thus securing to Abbott a one third interest of the purchase price.

Creede and Smith answer, alleging the existence of the contract up to the 20th day of June, 1889, at which time it is insisted Abbott voluntarily withdrew from the partnership. No decree is sought against Moffat, and since the institution of the suit, claim against Naylor's interest has been abandoned. So that it can be said that Abbott seeks to obtain a decree adjudging to him the one third of the two thirds of the purchase price belonging to Creede and Smith.

The cause was tried to a court without a jury, against the protest of defendants, resulting in a finding favorable to them, and upon which judgment was entered. To reverse this judgment Abbott prosecutes this writ of error.

This case presents no unusual features. Such contracts have been productive of much litigation. The testimony shows that for a period of four years Abbott had continuously furnished capital for himself and Smith to Creede, aggregating the sum of \$2,000; and that when the parties started on the prospecting tour which resulted in the location of the claims, they were amply provisioned and well supplied with tools purchased with funds furnished by Abbott, and that at the identical time of the location and the subsequent development of the property to the extent of showing that the mines were of some worth, they were sustained and assisted by the means thus provided. They had been prospecting in the location where the mines were discovered for several months prior to August 1889. In June, 1889, it seems that Abbott felt that he was being called upon for too much money, and

that Smith, who was obligated to furnish an equal portion of the funds was not doing his share. He insisted upon a settlement, and Smith being unable to pay the money at the time of the settlement, executed his note, thus evidencing the amount of money due to Abbott.

Abbott testified that in the spring of 1885, the agreement was entered into, and that from that date up to the institution of these proceedings it was continued ; that Smith and himself were to furnish the funds to develop any property that Creede might find, paying him \$1.50 a day and allowing him so much for grub ; that Creede was to have one third interest in all claims located, Smith one third and Abbott one third ; that in 1885 they located properties on the South Gunnison and Willow Creek, and that the yearly expenses incident to this enterprise amounted to between \$350 and \$400 each.

It is needless for us to give in detail the testimony of Abbott, it is sufficient to say that in substance it shows that he had visited the location where the mines were discovered, had inspected various properties previously located, and caused assays to be made, and done all in fact that Creede or Smith had required of him. He positively asserts that the settlement of accounts relative to money advanced by him was not to be considered as an abandonment of his agreement, but only the result of a desire on his part of a settlement with Smith, to which Creede was in no sense a party. The testimony of Abbott is certainly corroborated by letters of Smith. In this connection it must be borne in mind that Smith insists that the dissolution of partnership took place in June, 1889, yet the record shows that on October 20, 1889, Smith writes a letter to Abbott in which he says: "I wrote you some time since that Naylor and myself would visit our new find, and I would report on my return." * * * He gives a description of the vein, the character of the ore, and asks for advice in reference to the best method of transporting the ore from the mine to the railroad. August 31, 1890, he writes another letter in which he says: "I received a letter from you, yesterday, and I judge from the date on it, it has been

traveling over the country for the last week. * * * I have been doing my level best to sell our mines over on Rio Grande, but up to date have failed. Another party is after it now that I think will do some good, I shall start over tomorrow ; will be gone about ten days ; I will let you hear from me when I get back ; I tell you Chas. I am awfully anxious to sell it for I am in debt, consequently I am in misery."

It must be borne in mind that Creede was one of the partners, the one who was expected to find the property and to locate it in the names of all the parties. He had been paid for his services and furnished with his provisions for a period of years ; he was then receiving his compensation from Abbott and Smith. Abbott furnished the bulk of the money, and it nowhere appears in the record that Creede ever understood that Abbott was out. Nor had there been any conversation with him concerning the matter. In fact Creede fortifies the position of Abbott. He testified that "I started prospecting for Smith, Abbott and myself in May, 1885 ; that in June, 1889, Abbott came across the range ; that he, Smith and Abbott went to Cascade Cabin and Spring Creek and Willow Creek ; that his understanding was at this time that he was to keep on prospecting in the same way he had been doing, and that this was the understanding of Abbott. That Abbott had been sending him money for a couple of years, and that he naturally looked to Abbott for money to carry on the business ; that Abbott never had sent him word that he had withdrawn from the partnership ; that Smith and Abbott left about the 13th or 14th of June, and that Smith joined him on Powder Horn, and they went prospecting south and were out eight or ten days. On the first trip they located the Holy Moses mine, about nine or ten miles south from the cabin ; they had ten or fifteen days' supplies for two, and had no supplies, tools or powder except those purchased with money furnished by Abbott. That he used partnership tools and powder on the Holy Moses, and supported himself with the provisions furnished from the same source, and that the first information he had received of the dissolution was from

Smith. In his cross-examination he says: I think in conversation Abbott claimed an interest perhaps a month before I discovered the Holy Moses. Smith was in camp and we were virtually together; that the grub in Cascade Cabin, when Smith came back was worth \$75.00, the value of the tools that he and Smith took, \$30.00 at a rough guess, and that when he staked The Holy Moses he did not think it was of any special value.

In addition to this it is shown that Abbott paid on July 12, 1889, succeeding the time when Smith claims that he had abandoned the partnership, for assaying ores from these mines, the sum of \$24.50 and reported the result of the assays to Smith. There are other circumstances in the record, detailed in the evidence, which we think add additional strength to the contention of Abbott.

To rebut this, Smith testifies that Abbott voluntarily retired and declared that he would have nothing further to do with Creede, and exhibits a letter written by Abbott subsequent to the location of the mine, wherein some expressions are used calculated in an indirect way to support his testimony. But we are certainly of the opinion that after the discovery of the mine, even up to so late a date as October of the same year, Smith did not believe that Abbott had withdrawn from the partnership; if he did, it is singular he should speak of the property in his letters to Abbott as our property; that he should advise him that *he would report on his return from his prospecting tour*, and should treat him as one who was entitled to information concerning the operations of himself and Creede. Abbott's explanation of his letter is certainly consistent with his contention. He says he did not mean to say he was out of the enterprise, but that he was done furnishing money for the time being, and that it was the duty of Smith to proceed with the enterprise and furnish such money as might be required in the subsequent prospecting.

The rule concerning the rescinding of such an agreement as is here under consideration is that the circumstances must

show an absolute abandonment of the contract as to future enterprises, and proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement. The parties cannot treat the contract as binding and rescind it at the same time. *Chadbourne v. Davis*, 9 Colo. 581.

Accepting this rule as correct, and applying the evidence as we find it in the record, we are unable to concur in the conclusion reached by the court below.

The testimony does not show an absolute abandonment on the part of Abbott, but it does show that during the entire period up to and including the location of the mines, Creede as well as Smith considered Abbott as still interested in the prospecting enterprise. Creede positively asserts it and Smith absolutely admits it by his letters. And had the mines proven without value, or the prospecting tour fruitless, it cannot be doubted but that Creede at least, if not Smith, would have insisted upon Abbott's paying his proportion of the expenses including the sum due Creede for services. The evidence does not show that a demand on the part of Creede and Smith or by either of them was ever made upon Abbott, nor does it show that there was a necessity for so doing because of the fact that the supplies and tools then on hand were amply sufficient to carry on the enterprise up to the time when the location of the mines was made.

This case is somewhat similar to *Meagher et al. v. Reed*, 14 Colo. 335, wherein it is determined "that the existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced and carried on to any extent, there is a partnership." In this case as in that, we say defendants had a remedy. If he did not comply with his agreement, they could have asked for a dissolution, paid him back the amount he put in and form a new partnership; they could have demanded the performance of the agreement, the contribution of his share of the expenses. But they had no right to assume that Abbott, who had furnished the money,—

not only his portion but that of Smith's—that because Abbott demanded a settlement with Smith he thereby dissolved the partnership between Smith, Creede and himself.

In the case of *Eagle et al. v. Bucher*, 12 Morrison's Mining Reports, 330, the court in passing upon a question similar to the one here under consideration used this language: "The principle relied upon by defendant's counsel, that a partnership may be dissolved by the act of one of the partners, we do not, in the view we take of this case, intend to impugn. That is too well settled to be now questioned. But to effect that purpose the act must be done with a view to its accomplishment. It should be communicated at once to the other members of the firm. They must be advised of the new relations created by the withdrawal of a member, or a transfer of his interests in the concern. Their future relations towards each other, and their pursuits of the particular enterprise, depend upon the acquisition of such knowledge."

This principle is directly applicable to the parties in interest, and supports the conclusion we have reached. In addition to this we may call attention to the fact that Creede was to do the prospecting for which he was to receive provisions and \$1,50 per day, to be provided and paid by Smith and Abbott. This is their relation as shown by the record, and stands uncontradicted. It occurs to us therefore, that it matters little what Smith may have understood from Abbott, when Creede himself testifies that he considered Abbott in the enterprise and looked to him to furnish money under the agreement. And the record fails to show that Smith had ever furnished or was at the time of the location of these mines furnishing money or means wherewith to support or compensate Creede for his labor. This fact of itself makes it clear to our minds that if any individual name of this partnership should have been left out of the location, it should have been that of Smith rather than Abbott. At any rate, under the principle last recited, it cannot be said in the light of the testimony that the prospecting partnership had been dissolved. And we think that if Creede was fortunate in

his location, if his hopes were more than realized by his good luck, he ought to have borne in mind that the aid Abbott rendered him had mainly contributed to his good fortune—that in reality without Abbott and the employment of the means furnished by him to engage in the enterprise, the possibility of the discovery of the mines would have been very remote.

In *Boucher et al. v. Mulverhill*, 12 Morrison's Mining Reports, 350, the court in considering a prospecting contract, said: "There is no dispute but that said Barrette and Lowthier were the discoverers; that plaintiffs furnished the money and provisions for some time before the discovery, to continue the prospecting for gold, and that they were living on these provisions when they made the discovery." And under these circumstances the conclusion of the court was that the parties were entitled to maintain their rights to their interests in the mines.

"An agreement to engage in the business of prospecting for and the development of lode mining property, for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other in prosecuting the joint adventure." *Lawrence et al. v. Robinson, et al.*, 4 Colo. 567.

The evidence, in our judgment, is wholly insufficient to support the finding of the court. And this conclusion therefore brings this case within the rule laid down by the supreme court of this state: "Where the verdict is clearly and manifestly against the evidence it should be set aside in furtherance of justice." *Keating v. Pedee*, 2 Colo. 526: *Bugh v. Rominger*, 15 Colo. 452.

In *Cross v. Kistler*, 14 Colo. 572, the doctrine is announced that where the evidence does not tend to support the finding the judgment will be reversed, as being against the evidence.

In *Mitchell v. Reed, et al.*, 16 Colo. 109, the court uses this language: "It is the opinion of this court that the judgment was manifestly against the evidence, and is without the sup-

port from the testimony, which is not satisfactorily contradicted and explained."

Under these circumstances, however much the court may regret the necessity for a reversal, and whatever may be the pressure of the general rule restricting interference with judgments upon this court, it is obvious that in obedience to its conviction the case must be reversed.

The judgment is reversed and the cause remanded.

Reversed.

FIST ET AL., APPELLANTS, v. FIST ET AL., APPELLEE.

1. APPELLATE PRACTICE.

A judgment on a verdict rendered upon conflicting testimony, will not be reversed on the ground that the evidence does not support the verdict.

2. PRACTICE—SURPRISE.

A party will not be heard to claim that he was surprised by, and for that reason unprepared to meet, the testimony of his adversary as to facts which were specially pleaded.

3. PRACTICE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence going only to impeach the credit or character of a witness, is not a sufficient ground for a new trial.

Appeal from the District Court of Montrose County.

Messrs. GERRY & CAMPBELL, Messrs. GOUDY & SHERMAN and Mr. WILLIAM E. BECK, for appellants.

Messrs. GRAY & SELIG, for appellees.

RICHMOND P. J., delivered the opinion of the court.

The plaintiff, Jacob Fist, appellee herein, brought this action to recover the sum of \$2,000, from the appellants, Emanuel and Julius Fist, as partners, for work and labor done. The defendants by their answer deny the indebtedness and set up

a settlement which they allege was made September 5, 1890, averring that at the time of the settlement they paid to the plaintiff the sum of \$300, and took from him a receipt in full of all demands and accounts existing between the parties. In the replication to the answer, plaintiff admits that he was paid the sum of \$300, and that the sum was credited on the account of the defendants, leaving a balance due him of \$2,000; denies that he made a receipt in full of all demands, and avers that he supposed the receipt contained simply an acknowledgment of the receipt of the sum of \$300; that he could neither read nor write the English language, and that if the receipt purports to be in full of all demands that it was fraudulently obtained, and without his knowledge of its actual contents.

On this state of facts trial was had to a jury and resulted in a judgment for plaintiff in the sum of \$1,146.25. Motion for a new trial overruled; exceptions reserved to the judgment which was entered. To reverse which the copartners prosecute this appeal.

The errors assigned are: That the verdict is unsupported by the testimony; that the court erred in its instructions to the jury, and in refusing to give instructions asked by the defendant, and in overruling the motion for a new trial.

We find that all the errors alleged are without support in the record. It would avail nothing for us to recite the testimony in full for the purpose of sustaining the conclusion we have reached regarding it. Such is not the usual practice of courts of review when, after a careful reading of the testimony, it appears that there is sufficient evidence upon which the verdict of the jury could have been predicated.

The plaintiff testifies to the employment and to the fact that no sum was agreed upon between the parties as compensation for his services as a bar tender for the defendants. He fixes the value of his services for one year at \$50, for another year at \$75, and for the third and fourth years at \$85 per month, and he fortifies this by the testimony of other witnesses. He distinctly testifies that he went to the city

of Pueblo for the purpose of settling with the defendants at the suggestion of one of them; that they went over the accounts between them, made some figures, and thereupon the defendant, Emanuel Fist, gave him a check for \$300, which he receipted for, supposing it to be a simple receipt for that sum. That he did not understand the English language and could not read or write. That upon his return to Montrose, through papers showing the condition of the accounts between them which he had received from Emanuel Fist, he learned that he had receipted in full; that he then and there repudiated the transaction, and on the day subsequent quit the service of the defendants.

The defendants in their testimony corroborate the plaintiff so far as he testifies that no sum had been agreed upon for the services to be rendered, but positively swear that at the time of the payment of the \$300, the execution of the receipt, plaintiff understood thoroughly what he was doing, and that it was a complete and absolute settlement between them. That thereafter the plaintiff returned to Montrose from Pueblo for the purpose of entering into the employment of the defendants as before, for an agreed sum.

This issue thus made by the pleadings and the testimony was submitted to the jury after instructions given by the court, resulting in the above verdict.

By the rule of the supreme court of this state as well as by this court, there can be no reversal of this judgment on the ground that the evidence does not support the verdict, as we think it does.

It is also urged that the court erred in its instructions. If it did, the error was one of which the defendants cannot complain. The question of a settlement and the giving of the receipt was fairly and squarely submitted for the consideration of the jury by the instructions given at the request of defendants. A review of the entire charge to our mind shows that if any error was committed, such error was favorable to the defendants. The instruction asked and refused

should not have been given. It practically takes the case from the jury. It was in these words:

“The jury are instructed that if they find that the plaintiff signed and gave the receipt introduced in evidence under a mistake, believing that said receipt was only a receipt for \$300, that as soon as he discovered his mistake it became his duty to rescind the same and to return the \$300, received by him, and a failure to do so will prevent his recovering herein.”

There is nothing in this record which would warrant the court in giving such an instruction. If the plaintiff received the \$300 as part payment on account, he had a right to retain it, and was under no obligation to return it. It was the character of the receipt of which he was complaining and impeaching. Why he should have repudiated the contract which he declares he never entered into, is beyond our comprehension.

The next and last contention of appellant is that he is entitled to a new trial because of newly discovered evidence, and in support of this he files an affidavit wherein he avers that he was not advised from the pleadings or from any other source, that the plaintiff would testify that he could not read and write the English language; that he had known him for many years and knew that he could both read and write the English language, and that he was surprised at the testimony, and could not at that time introduce any evidence save and except witnesses who testified upon this point; that since the trial of said cause he has ascertained that there are witnesses who could testify upon this point.

There is some mistake here. In the abstract furnished to this court it is distinctly set forth that plaintiff, by his replication to the answer, directly attacks the character of the receipt and alleges his lack of knowledge of the English language—that he could not read or write the English language. That he would not have signed the receipt if he had known that it was other than a receipt for the sum of \$300, and that if it contained or mentioned anything else, it was fraud-

ulently done and signed by plaintiff without knowledge of its actual contents.

With that replication as part of the pleadings, how can it be said that the defendants were uninformed concerning the contention of plaintiff regarding his knowledge of the English language. Besides, this is impeaching testimony and comes within the rule recited in *Christ v. The People*, 3 Colo. 394, wherein it is said: "It is a well settled rule that newly discovered evidence going only to impeach the credit or character of a witness is not sufficient ground for a new trial."

There is no error in this record which would warrant a reversal of the judgment.

The judgment must be affirmed.

Affirmed.

APRIL TERM, 1893.

MILLER ET AL., APPELLANTS, v. GIRARD ET AL., APPEL-
LEES.

1. MINING LAW.

If a locator of a mining claim permits an adjoining claimant to obtain a patent for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he loses title to whatever territory is embraced within the limits of his claim.

Appeal from the District Court of Pitkin County.

Mr. C. W. FRANKLIN and Mr. PORTER PLUMB, for appellants.

No appearance for appellees.

BISSELL, P. J., delivered the opinion of the court.

The condition of the proofs entitled the appellants to an instruction, which the court refused to give. No other matter will be considered, for the errors complained of are either not of sufficient gravity to reverse the case, or were cured by what subsequently occurred during the trial. A very brief statement will suffice to render the opinion intelligible. The controversy is in the form of an adverse suit between the owners of the Long John Lode and the owners of the Aurora and Elgin claims, which were located on Aspen Mountain in Pitkin county. The Long John was the prior location, having been located in the summer of 1883. The litigation does not involve the validity of any of the steps taken to initiate the title to any of the claims, and the facts with respect to these matters will not be stated. In May,

1888, the appellants, Carson and his co-owners, staked the ground, and took the requisite statutory steps to acquire title to the territory embraced in the Aurora and Elgin Mining claims. Subsequently, they made application for a patent, and while the advertisement was pending the appellees, Girard & Co., as owners of the Long John, commenced this adverse suit to determine the title to the disputed territory. Having the prior location, if in all other respects their title was good, they must of course succeed. Under the issues, as made up by the pleadings, and supported to a greater or less extent by the proofs, the owners of the Aurora and the Elgin attempted to maintain their right to the ground embraced within their lines by evidence which tended to show that after the Long John had been located, the North Star Lode, which was another claim in that vicinity owned by Tourtelotte and others, had been so located as to include within its exterior lines the discovery shaft of the Long John claim. The North Star, at the time of the trial, had gone to patent, and if the Long John discovery shaft was on the ground included within its boundaries, the owners of the Long John had of necessity lost title to that part of the territory. It was not established that the owners of the Long John had sunk any other discovery shaft within the limits of their claim prior to the location of the Aurora and Elgin which would amount to a compliance with the state and Federal statutes in this particular. There was enough proof in the case in respect of these matters to entitle the appellants to a finding by the jury on this subject, under an instruction which should aptly state the law respecting it.

Ever since the decision of the case of *Gwillim v. Donnellan*, 115 U. S. 45, it has been the conceded and established law that if a locator permits an adjoining claimant to obtain a patent from the government for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he must be adjudged to have lost title to whatever territory is embraced within the limits of his claim. That

case unquestionably decides, that if the locator permits the adjoining occupant to patent that part of his territory, it is the equivalent of an adjudication that he is without title, and the remaining part of his location reverts to the condition of public lands, and is open to location and purchase by other citizens and claimants, unless the locators in some legal fashion have initiated a new title. Since the proofs raised the question which tended to bring this case within the scope of that doctrine, the appellants were entitled to have the jury properly instructed on the subject. They asked the court to state the law to be as enunciated in that decision. The court stated it with this limitation, that the North Star owners were locators senior to the claimants of the Long John, and declined to apply the rule in case the jury found that the North Star owners were junior locators, though holders of a patent to the ground. In this respect the court erred. The law would be precisely the same in either case. When Tourtelotte and his co-owners received the title from the government—the date of the initiation of their title was a matter of no consequence. Having no title the owners of the Long John neither had it nor could they acquire it. They had lost their discovery shaft which was an essential evidence of their title, without which their claim could not be a valid one.

For the error committed by the court in refusing to give a proper instruction upon this subject, the cause must be reversed and remanded for a new trial, in conformity with this opinion.

Reversed.

DITTO ET AL., APPELLANTS, v. JACKSON, APPELLEE.

1. MECHANICS' LIEN.

It seems that since the right to a lien is dependent upon a contract, a subcontractor can acquire no other or greater rights than flow to him therefrom, and that it must be adjudged that his rights are to be taken as limited and controlled by the terms of the agreement between the original parties.

2. PLEADING.

The complaint of a subcontractor to foreclose a mechanic's lien which fails to state that, at the time the plaintiff furnished the materials, no payments had been made by the owner to the contractor, but which contains averments implying that the owner is indebted to the contractor, is not subject to demurrer for a failure to state facts sufficient to constitute a cause of action.

Appeal from the District Court of San Miguel County.

Mr. W. H. GABBERT, for appellants.

Messrs. HOGG & FITZGARRALD, for appellee.

BISSELL, P. J., delivered the opinion of the court.

This judgment must be affirmed. It will be affirmed upon a much narrower basis than that outlined by the arguments of respective counsel. It is one of those controversies which are constantly springing from the attempted enlargement by the legislature of the preferential rights which the lien statutes give to contractors, and men who furnish material for the erection of buildings.

In May, 1891, Ditto, one of the appellants, was the owner of certain premises in the town of Telluride, San Miguel county, and then entered into a contract with Frank Shewmaker to erect a building on the lot for an agreed sum of \$300. In the farther statement of his cause of action the plaintiff, Jackson, alleged that Shewmaker commenced the work, finished the building according to the contract, and

prior to the first day of June completed the work, and in all respects fully complied with his contract. There are further allegations in regard to the lumber furnished by Jackson, under a contract with Shewmaker, and the filing of a lien under the statute. It is apparently conceded by the appellants that the complaint is a sufficient statement of the cause of action, save in one particular—to wit:—that the pleader failed to state directly that no payments had been made by Ditto to the contractor, Shewmaker, prior to the time that Jackson, the appellee, furnished the materials for which he seeks to recover in this action. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action, and from the judgment overruling the demurrer, the owner of the premises appeals.

The lien law of 1883 was radically amended by the act of 1889, Session Laws of 1889, page 247. Section seven of the act substantially provided that the lien of the subcontractor should extend to the full amount to be paid the contractor by the owner of the property, and in express terms enacted that “any payments made by the owner to the contractor either before or after making such contract * * * shall be at the risk of the owner.” The arguments of counsel have been addressed to the construction of this statute. It is a matter of great gravity and serious importance, and one which must ultimately be decided whenever a case is brought here which discloses in the record enough to justify its determination. The extent to which a legislature may go in determining what contracts parties may make concerning a given subject-matter, or the power which the law makers possess to impose limitations upon the rights of parties to enter into an engagement with which at the time third persons have no concern, and whose subsequent rights are derivative and rest upon sufficient proof of the agreement between the original parties, is one to which the courts of the different states have at various times given great consideration, and reached conclusions not entirely harmonious. This identical question was once before pressed upon the attention of this court, and

while it was left undecided this court said in reference to it, "it has been very ably and earnestly contended that since, under the statute of Colorado, the right to a lien is dependent upon the existence of a contract, the subcontractor can rightfully be held to be subject to its provisions, and that he can acquire no other or greater rights than flow to him therefrom ; and that, regardless of the statute, it must be adjudged that his rights are to be taken as limited and controlled by the terms of the agreement between the original parties. There is great force in these suggestions." *Davis v. John Mouat Lumber Co.*, 2 Colo. Ct. App. 381.

This intimation of the court's opinion respecting this matter, was based upon an elaborate and well considered case in Philadelphia, *Schroeder v. Galland et al.*, 134 Pa. St. 277, which held that since the subcontractor's right was entirely derivative, he was bound by the express limitations of the written contract between the original parties, under and by virtue of which, his own agreement was to be performed, and from and through which his rights were solely and clearly derived. It is thus plain to see, that under some circumstances it might be true that the subcontractor would be without the right to enforce a lien, or to contend that under and by virtue of the statute, he could recover the amount of the original contract price, notwithstanding the terms of the agreement between the contractor and the owner. Since this might be true, it cannot be said that the complaint is open to a demurrer, on the basis that it has failed to state facts sufficient to constitute a cause of action. It contains enough to warrant all the proof essential to a recovery on the part of the plaintiff, and contains by sufficient inference, if not by direct statement, the averment that the owner of the property was indebted to the contractor. The pleader states the terms of the original contract, and avers full compliance by the contractor, whereby as a matter of law, the sum which the owner agreed to pay for the building became due from him to the contractor, and the right to a lien would necessarily inure to the material man who furnished the

lumber, unless defeated by circumstances which are neither pleaded nor proven. Whether the complaint would have been open to a motion in respect to this allegation, or whether a special demurrer because of this particular defect would have been available, need not be determined. It is enough to say that in its allegations, the complaint did state a cause of action, which might have been fully proved thereunder, and was not vulnerable to a general attack for a failure to state facts sufficient to entitle the complainant on proof to a judgment.

The court committed no error in overruling the demurrer, and when the defendants declined to answer, or in any other manner assail the pleading, the court rightly entered judgment thereon.

Affirmed.



WOOD, PLAINTIFF IN ERROR, v. LAKE, DEFENDANT IN
ERROR.

1. PRACTICE IN JUSTICE COURT.

Whenever the act regulating the jurisdiction of justices of the peace provides the remedies when a litigant's rights are not respected by the magistrate, such remedies are exclusive.

2. CERTIORARI.

A petition to remove a cause from a justice of the peace, which does not show that the judgment was not the result of negligence, and that it was not in the power of the petitioner to take an appeal in the ordinary way, is insufficient.

Error to the County Court of Garfield County.

Mr. SETH H. WOOD, for plaintiff in error.

Mr. H. P. BENNET, Jr., and Mr. ROBERT A. BENNET, for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

This is one of those extraordinary cases, in which the judgment which was originally entered against Lake ought not to stand, and in which the judgment impeaching it rendered upon proceedings under a writ of certiorari cannot be sustained. The result looks like an apparent inequity, but under the record, justice is not far from being accomplished.

Emma Pruitt brought suit against Lake to recover twenty-five dollars due her for work and labor done. Wood, a justice of the peace in Garfield county, after proper steps taken to that end issued a writ of attachment in aid of the suit. It was effectuated by process of garnishment served on a corporation which admitted an indebtedness to Lake in a sum beyond the plaintiff's claim. After the action was started, Lake settled the case out of court, did not appear on the return day, and evidently sought to escape responsibility for the costs incurred by the proceedings. The justice subsequently entered a judgment against him for the accrued costs, and included therein a fee of \$5.00 for the plaintiff's attorney, which the counsel contended he had earned in the collection of the debt. The judgment was for \$24.10 and when the justice issued an execution on it, Lake endeavored to escape liability by attacking the judgment. It would not be useful to recite the various grounds on which it is claimed the judgment is invalid. It need only be stated that the defendant, Lake, did not appear, and prosecuted no appeal. He subsequently initiated the present proceedings against Seth Wood, the justice, because that magistrate was without jurisdiction to enter it. When the petition was filed in the county court, that tribunal issued a writ of certiorari, brought up the proceedings, adjudged them to be erroneous, taxed the costs against the justice and entered judgment accordingly.

If the parties had proceeded regularly and in accordance with the statute, the finding would have been good, and the magistrate would have been remediless. The act concerning justices and constables provides that in certain cases and under certain circumstances, the judgments which may be

entered by a justice of the peace are reviewable under proceedings initiated by this writ. There is no trouble in holding that the justice's act, which gives this remedy, must be exclusive, and that a party is bound to bring himself within the scope and terms of this law respecting it, if he seeks otherwise than by appeal to overturn a judgment which the justice may have entered. It is seriously contended in argument that the Code provisions respecting the writ of certiorari are likewise applicable, and if under either it or the justice's act the proceedings may be justified, the judgment appealed from must stand. This cannot be the law. In general the provisions of the Code have no relation to proceedings before a justice; and wherever, as in the present case, the act regulating the jurisdiction of justices of the peace provides the remedies when a litigant's rights are not respected by the magistrate, these remedies must be taken to be exclusive. The chapter concerning certiorari in the Code is therefore entirely inapplicable, and the sufficiency of the present proceedings must be treated by the statute as interpreted by our supreme court. The act has been considered by that court on several different occasions. Their conclusions respecting its requirements are uniform, definite and well settled. *Tilton v. Larimer Co. A. & M. Ass.*, 6 Colo. 288; *Small et al. v. Bischelberger*, 7 Colo. 564.

Section 1995 of the statute of 1883 requires the petition to contain, according to the decision last cited, three things, viz:—"First, that the judgment before the justice was not the result of negligence on his part; second, that the judgment, in his opinion, is erroneous and unjust, stating wherein such error and injustice consist; and third, that it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing." This very lucid statement of the law by Judge Helm removes all difficulty from the determination of this case. The petition in no respect complied with the statutory requisites thus clearly and abundantly stated. There was no showing whatever that the judgment was not the result of

negligence, nor any showing that it was not in the power of Lake, against whom the judgment was entered, to take an appeal and review the judgment in the ordinary way. Since a petition lacking these or equivalent statements, and containing nothing to bring the case within the statutory requirements will not, under those decisions, support an application for the writ and a judgment thereon, the action of the court below cannot be sustained.

For the error committed by the court in entering the judgment upon an insufficient petition, the case must be reversed and remanded.

Reversed.

HUNTER ET AL., APPELLANTS, v. FERGUSON, APPELLEE.

1. FRAUD.

Any alienation of property for the purpose of hindering, delaying or defeating creditors in subjecting the property to the payment of debts, is fraudulent.

2. DEBTOR AND CREDITOR—PREFERENCE.

A debtor has the right to prefer his creditor.

3. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—FRAUD.

To vitiate the general assignment for the benefit of creditors there must be a fraudulent intention, followed by irregular and fraudulent disposition of the property: in other words, there must be either a reservation of the property, or such a disposition of it, that the proceeds will inure in some way to the benefit of the assignor.

4. SAME.

The assignor must provide no benefit to himself other than what may result from the payment of his debts; impose no condition upon the right of his creditors to participate in the fund; authorize no delay on the part of the trustee.

5. SAME.

A person may make a legal assignment of all his property for the benefit of creditors, notwithstanding his assets may be in value many times the amount of his indebtedness, and an expectation of the surplus after the full payment of debts is not a badge of fraud.

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4	34
3	287
5	62
6	227
3	287
8	216

6. INSTRUCTIONS.

Where there is no evidence upon which instructions in regard to fraud can be predicated, it is an error to give them.

Appeal from the District Court of Weld County.

PRIOR to the first of November, 1890, appellants as partners under the firm name of Hunter & West, were doing a banking business at Greeley. About that date the business was closed, and they were succeeded by the Greeley National Bank. On the 25th of August, 1890, appellee deposited with the firm \$225; on the third day of September made another deposit of \$175; on the 30th day of September another deposit of \$125; on October 6th another deposit of \$175. For each of such deposits she received a certificate payable six months after date with interest at 6 per cent. per annum; the different certificates aggregated some \$700.

After November 3d, when succeeded by the Greeley National Bank, defendants were found to be in a failing condition and insolvent. Demand was made by appellee on December 26th for the payment of the respective certificates. They were not paid. On the same date this action was commenced in the county court in the county of Weld, by filing a complaint and suing out an attachment, alleging as grounds for attachment that the certificates of deposit were overdue and unpaid; that the defendants had fraudulently transferred and assigned, and were about to fraudulently transfer, convey and assign their property and effects so as to hinder or delay creditors. The attachment was levied upon certain chattels, and certain supposed debtors of the firm were served with process of garnishment. On the same date, December 26, 1890, after the attachment was levied, Hunter & West, and West individually, made general assignments of all their property for the benefit of their creditors.

Special traverse denying each allegation contained in the affidavit for attachment, was filed. An answer to the complaint, traversing each material allegation, was also filed. Upon the issues so formed trial was had to a jury, resulting

in a verdict for the defendants, with special findings that the certificates of deposit were none of them due, and that the defendants had not and were not about to fraudulently dispose or transfer or assign any of their property.

Judgment upon the verdict, dismissing the attachment. An appeal was taken to the district court, and trial had at the May term, 1891, resulting in a disagreement of the jury. At the November term of 1891, a trial was had to a jury, resulting in a verdict for the plaintiff, and a finding that the defendants, on the 26th of December, 1890, did fraudulently transfer their property, and were about to fraudulently transfer their property with intent to hinder and delay their creditors. The court instructed the jury that the certificates of deposit sued on were not due when the action was commenced, and that question withdrawn from their consideration. Motion for a new trial was denied, judgment entered upon the verdict for \$730.31. An appeal was prosecuted to this court.

The supposed errors relied upon by counsel in argument are :

The third, as follows : “ The verdict, the order sustaining attachment, and the judgment of the court is unsupported by and against the weight of the evidence.”

The sixth, being to an instruction of the court : “ The court further instructs you that if you believe from the evidence that the acts, statements and conduct of the defendants, or either of them, at and about the time the attachment in question was sued out, were such as fairly and reasonably showed an intention on their part to so dispose of their property as to intentionally hinder and delay and defraud their creditors, you should find for the plaintiff.”

The seventh assignment of error, also to an instruction of the court, as follows :

“ If you find from the evidence that George H. West, managing partner of Hunter & West, bankers, believed at the time the assignment was made that there was enough, or more than enough, property in said firm to pay all indebtedness, and if judiciously managed there would be a surplus

left after paying all debts, and that one of the moving reasons for the making of such assignment was the protection of such surplus, such facts in connection with the assignment, are a badge of fraud and indicative of an intent to convey property so as to delay, hinder or defraud creditors."

The ninth assignment, that the court erred in modifying an instruction asked by defendant's counsel, as follows:

"The court instructs the jury that where, in consequence of action of one or more particular creditors, there is danger that the property, which but for such action would be sufficient to pay every debtor in full, will fall short of that result; and the object and intent of the debtor are to enable all his creditors to realize their entire demands, and prevent loss or injury to anyone, he is in a condition to make a valid assignment for the benefit of all his creditors. When the property of a debtor is of a doubtful character, and may or may not, according to circumstances, be sufficient to discharge his debts in full, and his primary object and influencing motive is to distribute it equitably and fairly, an assignment in such case instead of violating the policy of the law for the rights of creditors is in harmony with both. The possibility of a surplus resulting in such a case to the debtor himself would form no objection to such an arrangement." To which the court added "But a debtor is not allowed to make an assignment to prevent a sacrifice of his property, when no one but himself is in danger of being a loser by its immediate appropriation."

Mr. H. N. HAYNES, for appellants.

Mr. A. C. PATTON, and Mr. J. W. MCCREERY, for appellee.

REED, J., delivered the opinion of the court.

Taking up the errors assigned in the same order as discussed by counsel, the third is the first to be considered, viz.:

That the verdict and judgment sustaining the attachment were against the weight of evidence, and unsupported by the evidence. Ordinarily the verdict of a jury will not be disturbed where the testimony is conflicting, and there is sufficient evidence to sustain the verdict.

The only question to be determined was that of fraud. It has been frequently said by the courts that fraud is a question of fact to be determined by the jury, by all the circumstances of the case ; but it would perhaps be safer to say that it is a mixed question of law and fact. "It is the judgment of law on facts and intents." Waite on Fraud. Con., 22 ; *Pittibone v. Stevens*, 15 Conn. 26 ; *Sturdevant v. Ballard*, 9 John, (N. Y.) 342 ; *Ottey v. Manning*, 9 East, 64.

"Fraud is always a question of fact with reference to the intention of the grantor. * * * Every case depends upon its circumstances, and is to be carefully scrutinized, but the vital question is always, the good faith of the transaction. There is no other test." Swayne, J. in *Lloyd v. Fulton*, 91 U. S. 485 ; *Humes v. Scruggs*, 94 U. S. 22.

Creditors have an interest in the property of the debtor. It has been called an equitable interest ; it is the fund to which they look for the payment of the debts, and the law makes it so. Any alienation of property for the purpose of hindering, delaying or defeating creditors in subjecting the property to the payment of the debts, is fraudulent. So long as a man retains the control and possession of his property, whether he is solvent or insolvent, he has the legal right to dispose of his property, and if he does so honestly and honestly applies the proceeds in the discharge of his indebtedness, he has full right to do so. But any transfer to put the property beyond the reach of creditors or to reserve benefits to himself is fraudulent ; hence the question, as before said, is the intention, and this must be determined from all the circumstances.

In the management of the property and the application of it by the parties preceding the assignment, we find no evidence whatever of misapplication or fraudulent disposition.

It is not contended in argument that there was not a *bona fide* use of the assets in the payment of legitimate indebtedness, nor is there any evidence or claim that the debtors were to have any resulting benefits from any of the transactions. So long as a debtor retains control of his property he can legally prefer one creditor to another. Even if insolvent, he can pay to one the entire indebtedness, to another nothing, and such discrimination is legal. A careful review of all the testimony fails to show that a dollar was misapplied; it only shows that some were paid and others were not; that the debtors had exercised the legal right of election and discrimination, consequently, the first clause of the paragraph upon which the attachment was based, viz.: "That defendants had fraudulently conveyed, transferred and assigned their property" * * * so as to hinder and delay creditors, was absolutely unsustained by any evidence.

The following is sec. 186, Mill's Ann. Stat.: "No assignment shall be invalid because of misappropriation of the property of the debtor by him, prior to the assignment, but the assignee may recover such property, if so misappropriated in fraud of this act. But nothing in this act contained shall invalidate any conveyance or mortgage of property, real or personal, by the debtor before the assignment, made in good faith, for a valid and valuable consideration."

In attempted support of the second clause of the affidavit for an attachment, viz.: "are about to fraudulently transfer, convey and assign their property and effects so as to hinder or delay their creditors," the evidence was of an intention to make a general assignment for the benefit of all creditors, which was done the morning after the suing out of the attachment in this case. A general assignment by a debtor of all his property for the benefit of all his creditors is not a fraudulent disposition of property furnishing ground for an attachment when it is made honestly and *bona fide*. To vitiate it there must be fraudulent intention followed by irregular and fraudulent disposition of the property or a failure to convey all. In other words, there must be either a reser-

vation of property or such a disposition of it that the proceeds will inure in some way to the benefit of the assignor. If made fully and in good faith, it is not only a proper and legal application of assets, but an equitable one, preventing the sequestration and sacrifice of the estate by a few at the expense of the many, and although it may operate to hinder and delay creditors, it is no ground for attachment. The fundamental principles are that "the debtor must devote all his property absolutely to the payment of his debts; reserve no control for himself." *Riggs v. Murray*, 2 John. Ch. (N. Y.) 565; "Must provide for no benefit to himself, other than what may result from the payment of his debts; impose no condition upon the right of the creditors to participate in the fund; authorize no delay upon the part of the trustee." *Sutkins v. Aird*, 6 Wall., 79; *Oliver Lee & Company's Bank v. Talcott*, 19 N. Y., 148.

A very careful examination of all the evidence—and a very wide range was properly allowed—fails to show that any of the rules or controlling canons were violated, and that there was not a full, complete and absolute transfer of all the property for the benefit of all creditors. We can find no evidence upon which the verdict could be based, and conclude that it must have been the result of bias or prejudice on the part of the jury, or that the jury was misled in regard to the law, by the instructions of the court.

It is in evidence that on the day this action was commenced and the day preceding the assignment, Mr. Hunter, managing partner of the firm, in conversation with the husband of appellee, said that if he could not get money they would have to go to the wall. "That he had considerable ditch stock and he would dispose of it, and he would have from ten to twenty thousand dollars left, and I need not be alarmed about my money." Again, "he said he would have \$15,000 or \$20,000 left after he settled up his business. This was the only evidence in the case upon which any question of fraud was attempted to be predicated, and the only basis for the instructions of the court submitting the question of fraud

to the jury. It is claimed that this expression of a hope, opinion or expectation of having a balance left after full payment of debts, was a badge of fraud and the question was submitted to the jury by the instructions.

The instruction on which the seventh assignment of error is based is faulty. It is in conflict with the statute which provides "That any person may make a general assignment of all his property for the benefit of all his creditors." The right is neither modified nor restricted, nor is the question of sufficiency, or surplus, or inadequacy, made a factor. The right to make the assignment is absolute, regardless of such considerations. As before stated, it is only necessary that it should be full and complete, a *bona fide* conveyance of all the debtor's property for the benefit of all his creditors, these being the only requisites or tests of validity. In order to vitiate the assignment, it must be found lacking in one of the essentials. The expressed expectation of a remaining surplus could in no way affect it, nor could the desire to protect it. A man can make a legal assignment although his assets may be in value four times the amount of indebtedness. Such being the law, it was error to submit to the jury the question of motive in regard to a supposed surplus. The language is also unfortunate. It is, "believed at the time the assignment was made that there was enough or more than enough property in said firm, to pay all indebtedness, and if judiciously managed, there would be a surplus left after paying all debts, and that one of the moving reasons for the making of such assignment was the protection of such surplus. *Such facts in connection with the assignment* are a badge of fraud and indicative of an intent to convey property, so as to delay, hinder or defraud creditors." This narrows and restricts the law, introduces a new element, and not only submits a question of motive, but clearly indicates that the assignment may be invalid because coupled with the motive. I can find no authority where the expectation of a surplus after the full payment of debts, is declared to be fraudulent or a badge of fraud. "It can seldom be the duty of the court to instruct

the jury that a single fact will warrant the jury in finding fraud. All the facts surrounding the transaction must be taken into account collectively." *Sleeper v. Chapman*, 121 Mass., 404.

For the same reasons the modification and addition to the instruction assigned in the ninth assignment of error is erroneous.

There was no evidence upon which the instructions in regard to fraud could be predicated, hence the giving of them was erroneous. *Allen v. Eldridge*, 1 Colo. 288; *Thatcher v. Kaucher*, 2 Colo. 699; *Lawson v. Van Auken*, 6 Colo. 52; *Burlock v. Cross*, 16 Colo. 162.

The finding and judgment sustaining the attachment must be reversed.

Reversed.

BOYES ET AL., APPELLANTS, v. THE GREEN MOUNTAIN
FALLS TOWN AND IMPROVEMENT CO., APPELLEE.

1. SPECIFIC PERFORMANCE.

The fact that a contract depends upon a condition precedent which has not been performed, is always a complete defense to a suit for its enforcement.

2. RESCISSION—DISCRETIONARY.

The rescission or cancellation of contracts or deeds and specific performance are not matters of absolute right, but matters resting in the sound discretion of the court.

3. RESCISSION, WHEN DECREED.

The court will decree deeds, leases or contracts to be canceled, when enforcing such instruments or agreements would be inequitable or unjust.

4. RESCISSION—DAMAGES.

Generally, where one fails to perform his part of a contract or disables himself from performing it, the other party may treat the contract as rescinded, and may elect either to sue for damages or to bring suit for a cancellation.

Appeal from the District Court of El Paso County.

APPELLANT was the occupant of 160 acres of land, having a pre-emption right upon it. The land was adjoining, and partially between tracts of land belonging to the appellee. Appellee, being desirous of obtaining the land, entered into negotiations with the appellant, which resulted in the conveyance of the land. The possession of the property was delivered to appellee. Appellant perfected his pre-emption right, entered the land and received a receipt from the Government Land Office on the 19th of August, 1889. Appellant instituted this suit, alleging his former ownership of the land, that it was of the value of \$7,000, that appellee procured the deed through false and fraudulent representations; also, alleging a failure to perform, as agreed, upon the part of the appellee; alleging also, that promises, made to him by way of inducement, to build an hotel worth \$75,000, grade streets, bring in water, etc., to enhance the value of the property, had not been kept; that with the exception of a partial and imperfect survey dividing a portion of the land into lots and streets, nothing had been done; and that the sum of \$100 was all the consideration he had received for the land, and praying that the deed be canceled, and for other and proper relief.

Appellee, after denying generally the allegations of fraud, etc., in the complaint, set out the following instrument in writing.

"Know All Men By These Presents: That the Green Mountain Falls Town and Improvement Company, a corporation with its principal office in the city of Colorado Springs, county of El Paso, and state of Colorado, is held and firmly bound unto James Boyes, of the county and state aforesaid, in the penal sum of five hundred dollars, (\$500) lawful money of the United States, for the payment of which sum, well and truly to be made to the said James Boyes, the said company binds itself and its successors.

"Sealed with its corporate seal, and dated this 26th day of December, A. D. 1888.

"The Green Mountain Falls Town and Improvement Co.

"F. E. Dow, President.

"I. J. WOODWORTH, as Secretary.

“The condition of the above obligation is such, that:

“*Whereas*, The said James Boyes has executed a Warranty Deed, running to the said Green Mountain Falls Town and Improvement Company, of the following property to-wit: * * * *Now Therefore*, If said company shall survey, grade and improve the streets on said lands, make other valuable improvements thereon, and commence within thirty days of the date hereof, to survey into lots, and plat said lands, or so much thereof as said company may deem practicable, and deed to said Boyes one-tenth of said lots so platted, to be divided as follows, to-wit:

“Said Boyes to draw one of said lots, and said company to draw nine of said lots, said drawing to be continued until all of said lots platted are drawn, also to pay said Boyes one-tenth of the net proceeds from the sale of said lands not surveyed and platted by said company, and to allow him, the said Boyes, to retain the house now occupied by him, then this obligation to be null and void, otherwise of full force and effect.

“It is distinctly understood and agreed by said Boyes that the penalty and conditions of the above obligations are subject to the validity and sufficiency of the above Warranty Deed above referred to.

“Signed, sealed and delivered in the presence of

“S. P. MADIERA, (SEAL)

“J. H. BOWMAN, (SEAL)”

Alleging that the \$100 paid and the conveyance of one-tenth of the lots was all the consideration appellant was to receive. Also, alleging its willingness and offer to make conveyance of the lots, and the refusal of appellant to receive. The answer also contains the following:—That appellee “should survey and plat into lots within thirty days, and grade and improve the streets—no time was specified when streets should be graded, but understanding that it was to be done when streets were needed.

“That defendant was to make other valuable improvements, which were understood to be water-works.

"That as further consideration for said deed defendant was to convey plaintiff one-tenth the lots so surveyed and platted of said lands." * * * "Defendant stands ready to and will grade said streets when needed" etc.

A replication was filed in which the statute of frauds was pleaded to the instrument relied upon. A trial was had to the court, a finding for the defendant and a decree dismissing the suit.

Mr. WM. HARRISON and Mr. T. O. TOWNSEND for appellants.

Mr. T. A. McMORRIS, for appellee.

REED, J., delivered the opinion of the court.

Prior to making the arrangement under discussion, appellee attempted to buy the property, making an offer of \$1000, which was refused. Failing to purchase, and wishing to secure it, appellee by its officers, commenced negotiations to obtain it, which finally resulted in the conveyance and the contract. Appellant received \$100 and the agreement, and conveyed his land.

It is stated in the complaint that appellant was a laboring man of foreign birth, with very limited business knowledge and education. The truth of this allegation is established by the transaction, and the acceptance of the contract with only a penalty of \$500.

It is alleged in the complaint that the property conveyed was worth \$7,000. Upon the trial, officers of appellee and witnesses in its behalf fixed the value variously, from \$6,000 to \$10,000. In regard to the conversations and inducements held out to appellant by officers of appellee, in order to secure the property, there is some slight conflict of testimony; but in all important particulars, witnesses substantially agree. Appellant was informed by Mr. Sprague, an officer of appellee, that streets were to be laid out and graded, water-

works put in, an hotel to cost \$75,000 to be built upon the land. Appellant still hesitating, Sprague asks him to see Mr. Dow, the president, and said, "that whatever Dow said I could depend upon, that he had the money to make the improvements," etc. Mr. Dow was seen, and so far corroborated Sprague as to induce him to make the arrangement. It at once becomes apparent, that the inducement for the conveyance of nine-tenths of the property was the agreement to expend a large sum of money then on hand, in the improvement of the property conveyed; and the consideration, the enhanced value of the other one-tenth by reason of such expenditure of money in improvements. Such is the unavoidable conclusion from all the testimony in the case—the circumstances and condition of the parties. It is evident that appellant relied upon the honor, ability and integrity of the officers with whom he dealt, and their assurance of funds on hand to make the contemplated improvements, and intention to do it. Otherwise, he would have no consideration whatever, except the \$100 received. Appellee failed to realize upon the enterprise, the "boom" collapsed, and no matter how honorable its intentions were, was unable to comply with the contract entered into, upon technical interpretation of which it now attempts to escape, and make appellant the victim. It is alleged that it had expended \$600 or \$700 in surveying and platting a portion of the property into lots. At that point it stopped, and required appellant to proceed to a division of the lots surveyed. The parties met and the following is the uncontradicted testimony of appellant in regard to what occurred at the interview.

"Saw Dow next evening. He wanted to know why I had not divided the lots. I told him that they had not fulfilled their contract. He said they had not agreed to make the improvements before division. I told him I had not agreed to divide the lots until improvements were made. He said 'they were going ahead to sell the lots, they had a deed to the property and were not going to make any more improvements, and all I could collect was the \$500; that they were

under no obligation to grade the streets then.' And this is corroborated by the defense interposed. In the answer it is said, '*Defendant stands ready to and will grade said streets when needed.*'"

The defense is not such as to appeal to a chancellor, a falling back and reliance upon the contract as far as appellant is concerned, while evading and avoiding its express stipulations and the evident intention and understanding of the parties. When the stipulations of a contract are relied upon, the party insisting must show full, complete and technical compliance with all important requirements. The obligations assumed by the appellee in the contract are as follows: "Now therefore, if said company shall survey, grade and improve the streets on said lands, make other valuable improvements thereon, and commence within thirty days of the date hereof to survey into lots, and plat said lands, or so much thereof as said company may deem practicable, and deed to said Boyes one tenth of said lots so platted, to be divided as follows, to wit: "

It first covenants to survey, grade and improve the streets. Second, "*make other valuable improvements thereon,*" then follows in regard to surveying and platting of lots, and their division between the parties.

It being conceded, or apparent, that the enhanced value of the one tenth by reason of the contemplated improvements and the expenditure of money upon the property was the sole consideration for the conveyance of the nine tenths, the failure to perform worked an absolute failure of consideration. The agreements on the part of the appellee must be regarded as conditions precedent to its right to enforce the contract against appellant. The setting of stakes and a plat upon paper left the land in its natural state, as far as marketable value was concerned. The entire tract as owned by appellant before the conveyance was in the same situation it was when he was required to take one tenth in consideration. The avowal of the appellee of a willingness and intention to lay out and grade streets when they should be needed,

is of no value ; it was to precede. It is an attempted evasion, an attempted reversal of the natural order. The laying out and grading of streets was necessary to the habitation of the lots. Occupants could not be expected to enter upon the land and compel the opening of streets.

The other valuable improvements covenanted to be made had not been made or entered upon, nor had any survey or plat of the lots been made as agreed. The contract was to survey and plat the lands conveyed. The testimony shows appellee to have owned lands adjoining the land in question on two sides, and that in the survey the lots crossed the lines, a fractional part of the lot being on each tract. This was clearly a violation of the contract, rendering the division provided for impossible. Appellant was not required to divide lots or take compensation from lands, other than that conveyed by him. Appellee by its answer sets up the contract and insists upon specific performance on the part of appellant. The acts to be performed by appellee being conditions precedent, and not having been performed is not legally in a position to enforce the contract against the other party. " When a contract rests upon a condition precedent, until the performance of the condition, it cannot be enforced, because until that time there is no true contract. * * * The fact that a contract depends upon a condition precedent, which has not been performed, is always a complete defense to a suit for its specific enforcement." Pom. on Spec. Performance, § 334 ; *Regents Canal Co. v. Ware*, 23 Beav. 586 ; *Laning v. Cole*, 3 Green's Chy. (N. J.) 229 ; *Dilly v. Barnard*, 8 Gill & John (Md.) 170 ; *Jones v. Roberts*, 6 Call (Va.) 187.

Appellee having failed to comply with its covenants and agreements, and relying upon the penalty of \$500, and the letter of the contract as against appellant, he was justified in regarding the contract at an end. No court of equity could or would compel him to take one tenth of the property he conveyed, in the same condition as when he conveyed, as a consideration for the whole. The rescission or cancellation of contracts or deeds and specific performance are not matters

of absolute right, but are matters of sound discretion in a court of equity, to be granted or refused, according to its own ideas of what is reasonable and right. 1 Story Eq. Jur. §§ 206, 692 & 693; *Mortlock v. Butler*, 10 Ves. Jr. 293.

In *Torrance v. Batton* L. R., 8 Chy. Ap., 118, it is laid down "That there is no general rule that actual fraud is necessary even in sales of land if the contract or enforcement of it is, in the opinion of the court, unconscientious, equity will rescind to it." *Graham v. Johnson*, L. R., 8 Eq. Cas. 36; *Jones v. Bolles*, 9 Wal. 364; *Glastenbury v. McDonald*, 44 Vt. 450; *Wilson v. Getty*, 57 Pa. St., 266; *Martin v. Graves*, 5 Allen, (Mass.) 601.

The court will take jurisdiction and decree deeds, leases or contracts to be cancelled, "when enforcing instruments or agreements would be inequitable or unjust." *Baker v. Mink*, 4 De G. J. & S., 388; *Wright v. Vanderplank*, 8 De G. M. & G., 133; *Hyer v. Little*, 20 N. J. Eq., 443; *Allose v. Jewell*, 4 Otto, 506; *Reid v. Burns*, 13 Ohio St. 49.

But in this case it is unnecessary to rely upon the equitable power and jurisdiction of the court to cancel and set aside the contract as inequitable and unjust. A failure to perform on the part of appellee was so far a repudiation of the contract as to warrant appellant in regarding it as rescinded, and he had his election either to sue at law for the breach for damages—treating the conveyance as valid, or, as in this case, to bring suit to cancel the conveyance and recover his land.

In 2 Pars. on Con., 679, it is stated, "Generally, where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded." See *Keys v. Harwood*, 2 C. B. 905; *Blanche v. Colburn*, 8 Bing. 14; *Shaw v. Turnpike Co.*, 2 Penn. St. 454; *Goodrich v. Safflin*, 1 Pick., 57; *Hill v. Green*, 4 Pick. 114.

Before entering into the final contract, appellee offered \$1,000 for the property, which was declined. Upon the trial, officers and witnesses of appellee fixed the value of the prop-

erty at from \$6,000 to \$10,000, and appellee had paid but \$100. To allow appellee, after failure to perform its covenants to give the property value, to retain the property, by falling back upon the \$500 penalty, thus keeping the property for \$600, would be clearly unjust and inequitable.

The district court erred in dismissing the suit, in effect holding appellant to specific performance. The decree will be reversed and cause remanded.

Reversed.

HUGHES, APPELLANT, v. COORS, APPELLEE.

1. **CONVERSION.**

The eviction from premises of parties who are lawfully engaged in removing the tenant's property, the locking up of the premises, keeping them locked, and preventing the removal of the chattels is a conversion thereof, and a recovery may be had for their value.

2. **APPELLATE PRACTICE.**

The finding as to the value of property converted, upon conflicting evidence, will not be disturbed.

Appeal from the District Court of Arapahoe County.

Mr. R. T. McNEAL, for appellant.

Mr. EZRA KEELER, for appellee.

REED, J., delivered the opinion of the court.

It appears that appellant was the owner of certain premises in the city of Denver, which were rented to and occupied by one C. B. Downing, as a saloon. Downing being indebted to appellee, Coors, executed a chattel mortgage upon the furniture and fixtures on December 16th, 1890, for \$800, payable in 4, 8 and 12 months. On the 18th day of May, 1891, Downing made a sale to appellee of the chattels covered by the mortgage, and gave him the possession. Appellee immediately employed necessary help and teams and commenced to remove the property. In the afternoon, while so engaged,

appellant came in with an officer who suspended the work of removal, took possession of the place, ordered it vacated by appellee's employees, which was done, the officer claiming to exercise his authority under some kind of a writ. A portion of the property being unmoved remained upon the premises. The building was locked and possession taken of it and its contents by appellant or the officer, or both.

This suit was brought to recover the value of the remaining chattels. The complaint is in the ordinary form, for the conversion. In the answer no legal defense is interposed, no justification or plea of a writ or any legal procedure, no claim of ownership of the property, lien upon, or right to possession. All such claims are disavowed, the attempted defense being that the goods were not removed and that appellant wanted the possession of the building at once, and took it. This was no defense whatever. It is shown that Downing had possession of the premises under lease; that lease and possession were assigned and transferred to appellee; that the lease had not expired, consequently appellee was legally entitled to the possession of the premises, as well as chattels.

The only legal question presented is, whether the eviction of the parties from the premises who were engaged in removing the property, the locking up of the premises, keeping them locked and preventing the removal, was a conversion of the property. That it was, and might be so regarded by appellee, and recovery had for its value, is well sustained by the authorities. In fact, so well settled and elementary, that no authorities need be cited in its support; but see, *Richardson v. Atkinson*, 1 Str. 577; *Philpot v. Kelly*, 3 Ad. & El. 106; *Dench v. Walker*, 14 Mass. 500; *McFarland v. Farmer*, 42 N. H. 386; *Rawson v. Tuel*, 47 Me. 506; *Duncan v. Stone*, 45 Vt. 118.

The only other question to be determined was the value of the goods converted. The evidence was conflicting, but the value found was justified by a part, at least, of the evidence, and having been found as a fact, will not be disturbed. The judgment must be affirmed.

Affirmed.

JONES, APPELLANT, v. HAYDEN ET AL., APPELLEES.**1. PLEADING—INDUCEMENT.**

In an action by the assignee of a void county warrant against the assignor, the allegations in the complaint in regard to the warrant can only be regarded as inducement or as explanatory of the cause of action, while the cause of action for which recovery could be had is the amount of money advanced, with interest.

2. MEASURE OF DAMAGES.

In all cases (unless special damages are pleaded) where the consideration for which money was paid fails, and the purchaser has a right of action, the measure of damages is the amount paid and interest.

Appeal from the District Court of Chaffee County.

THE following amended complaint was filed in this cause :

“First. That at all times hereinafter mentioned the said plaintiffs were and still are copartners under the firm name and style of Hayden & Dickinson.

“Second. That on or about the sixteenth day of July, A. D., 1885, The Board of County Commissioners of the county of Chaffee, in the state of Colorado, made its certain bill or instrument in writing commonly called a county warrant, in the words and figures following, to wit :

“\$1213.76. Chaffee County Board of County Commissioners. Treasurer of said County—July 16th, Term 1885.

“Pay to E. B. Jones or order twelve hundred and thirteen and seventy-six one hundredths dollars for collecting county taxes, out of moneys in the Treasury not otherwise appropriated.

J. A. ISRAEL,

Chairman County Commissioners.

Attest, ERNEST WILBER, County Clerk.

Per J. E. COLE, Deputy.

No. 8559.

“Third: That on, to wit: the twenty-third day of July, A. D., 1885, said instrument in writing was presented to the

county treasurer, of said county of Chaffee, for payment, and payment thereof was refused because there were no funds in the treasury wherewith to pay the same, and said treasurer indorsed upon said warrants as follows, to wit:

“Presented July 23, 1885, no funds. This warrant draws interest from this date at 10 per cent per annum. E. B. JONES, County Treasurer. By W. H. Kellogg, Deputy. Of all of which said defendant then and there had no notice.

“4th.—That the said instrument afterwards and before the commencement of this suit, on or about the first day of August, A. D. 1885, was sold, assigned, indorsed and delivered by said defendant to these plaintiffs and these plaintiffs then and there paid him the said defendant, a valuable consideration therefor, to wit: The sum of one thousand dollars.

“5th.—That said Chaffee county and the board of county commissioners thereof, have at all times neglected and do now neglect and refuse, by levy of taxes or otherwise to pay or to provide for the payment of said warrants or any part thereof, and that there is now due the plaintiffs thereon from the defendant, the sum of \$1213.76 with interest at ten per cent per annum from the 23d day of July, 1885.

“6th.—And the plaintiffs are informed and believe and therefore allege that at the time of the making said instrument in writing and at the time the services for which said instrument was given were performed, the assessed valuation of all the taxable property in said Chaffee county was more than one million dollars and less than five million dollars, and amounts to the sum of to wit: two million, four hundred and nine thousand, four hundred and fifty-eight dollars, and that the total indebtedness of said county for all purposes, exclusive of debts contracted before the adoption of the constitution of Colorado was at said time more than two hundred and eighty thousand dollars, and more than twelve dollars for and upon each one thousand dollars, of valuation aforesaid, and that therefore said instrument or warrant was, at the time of said sale, assignment, indorsement and delivery

of said defendant to these plaintiffs, void, illegal and without validity.

“And so plaintiffs aver that any suit upon said instrument of writing against said the board of county commissioners of the county of Chaffee would be unavailing at any time from thence hitherto and now.

“11th.—That said instrument in writing has not been paid, nor any part thereof, or the money due thereon.

“Wherefore, plaintiffs demand judgment for the sum of twelve hundred and thirteen dollars and seventy-six cents, with interest thereon from the sixteenth day of July, A. D., 1885, to the date of judgment herein, at the rate of ten per cent per annum, and for their costs.”

To which a demurrer was filed as follows:

“1st.—That the amended complaint does not state facts sufficient to constitute a cause of action.”

“2.—That said amended complaint is uncertain in this, that it does not state the amount of money paid by plaintiffs to the defendant for the said county warrant.”

The demurrer was overruled and defendant stood by his demurrer and declined to answer. Judgment was entered for \$2,001.29, from which an appeal was prosecuted to this court.

Mr. G. K. HARTENSTEIN, for appellant.

Mr. JOHN H. DENISON, for appellees.

REED, J., delivered the opinion of the court.

The only question to be determined is the correctness of the judgment overruling the demurrer.

As near as can be gathered from the complaint, the county authorities of Chaffee county issued to the appellant a county warrant for the sum of \$1,213.76, which was presented for payment to the county treasurer, payment refused; an indorsement was made:

“Presented July 23, 1885, no funds. This warrant draws interest from this date at 10 per cent per annum

“E. B. JONES,

“County Treasurer.”

Appellant sold, assigned and transferred the warrant to appellees “who paid a valuable consideration therefor, to-wit: the sum of \$1,000.” It is alleged also, that for the reasons stated in the complaint, “said warrant was * * * void, illegal and without validity.” For the purposes of the demurrer the allegations in the complaint must be taken as true, the warrant regarded as void, and the suit as having been brought to recover the amount paid by appellees for the warrant, with the interest upon such sum. According to well established rules of pleading, the allegations in regard to the warrant can only be regarded as inducement or as explanatory of the cause of action, while the cause of action for which recovery could be had was the amount of money advanced and the interest. Testing the sufficiency of the complaint by these rules, it at once becomes apparent that no cause of action is stated in the complaint. Counsel and court appear to have fallen into the error of supposing the action properly based upon the warrant. Counsel prays judgment for the face of the warrant, and interest from the date of presentation, and the court gave a judgment upon the same basis. Judgment was entered by default, no evidence was taken, and damages assessed upon the warrant. The record entry is, “The complaint herein being duly verified *and the action being upon contract for liquidated damages,*” etc.

It will readily be seen, that not only was the complaint defective, but the judgment erroneous. In all cases, (unless special or extraordinary damages are pleaded) where the consideration for which the money was paid, fails, and the purchaser has a right of action resulting from the character of the transaction, the measure of damage is the amount paid and the interest. The court erred in overruling the demurrer and allowing judgment for the amount of the warrant.

The judgment will be reversed and cause remanded.

Reversed.

MILLER, APPELLANT, v. THE CITY OF COLORADO SPRINGS,
APPELLEE.

3	309
10	509
3	309
17	309

1. COMPLAINT FOR VIOLATION OF ORDINANCE.

A complaint for violation of city ordinance which states the number of the section and title of ordinance violated, together with the date of its passage, is sufficient without setting forth the section or ordinance in full, or the substance thereof.

2. PRACTICE.

An action for the violation of a city ordinance may be commenced by ordinary summons without any form of pleading, but where a warrant issues in the first instance for the arrest of the offender it must be upon affidavit charging a violation of the ordinance.

3. SAME.

The specification in the affidavit of the particular manner in which the ordinance was violated is a limitation upon a general charge of violating the ordinance, and the proofs must be confined to the specific offense.

Appeal from the County Court of El Paso County.

Mr. IRA HARRIS, for appellant

Mr. T. A. McMORRIS, for appellee.

THOMSON, J., delivered the opinion of the court.

This action was commenced in the police court of Colorado Springs upon the following complaint: "L. C. Dana complains that J. K. Miller and J. W. Miller are indebted to the plaintiff, the city of Colorado Springs, in the sum of \$300, for violation of sections 1 and 2, of an ordinance of the city of Colorado Springs, entitled 'An ordinance concerning the sale of intoxicating liquors,' passed the 13th day of February, A. D. 1889, in this, to wit: That said J. K. Miller and J. W. Miller did sell and dispose of intoxicating, spirituous, malt, vinous, fermented and mixed liquors on Sunday, the 26th day of July, 1891, without having a prescription from

a regular practicing physician therefor, within the corporate limits of the city of Colorado Springs, county of El Paso and state of Colorado."

Appended to this complaint was the following affidavit: "Lo. C. Dana, plaintiff, being first duly sworn, says that he verily believes that said ordinance and sections one and two thereof, in the foregoing complaint specified, have been violated as in said complaint set forth, and affiant has reasonable grounds to believe that said J. K. Miller and J. W. Miller, the parties charged, are guilty thereof."

Upon the filing of the complaint and affidavit, a warrant was issued upon which the defendant, J. K. Miller, was arrested and brought into court. The complaint was dismissed as to J. W. Miller, and upon a trial the defendant, J. K. Miller, was discharged. The plaintiff then took the case by appeal to the county court of El Paso county, where it was submitted upon a written stipulation, or agreed statement of facts which is as follows: "It is hereby stipulated between the plaintiff and the defendant in the above entitled action, that the following shall be taken and considered as the facts and evidence in the trial of this cause, viz.: That the defendant, J. K. Miller, is a regular druggist doing business within the city of Colorado Springs, and at the time alleged in the complaint, he had a license to sell, as a druggist, fermented, vinous, mixed and intoxicating liquors in the said city of Colorado Springs, under and pursuant to the ordinances of said city, which ordinances are to be introduced in evidence herein.

"That on Sunday, the 26th day of July, 1891, upon a prescription prescribing one quart of whiskey, made on the day previous, to one Thomas Goff, by a regular practicing physician of said city, he sold and delivered to said Goff one quart of whiskey."

The two sections of the ordinance mentioned in the complaint, were introduced in evidence. The substance of those sections is that any person who shall sell or dispose of any intoxicating, malt, spirituous, vinous, fermented, or mixed

liquors, within the corporation limits of the city, or within one mile of its outer boundaries, shall be deemed guilty of an offense, and upon conviction thereof shall be fined ; provided any regular druggist, doing business and licensed by the city, may sell any of the liquors named, in quantities of not less than one quart, for medicinal, mechanical, and chemical purposes, on any day of the week except Sunday. And provided further that such druggist may sell in less quantities than one quart, for medical purposes only, on any day in the week, upon a prescription from any practicing physician.

At the hearing in the county court, the action was dismissed as to J. W. Miller. Counsel for defendant, J. K. Miller, moved to dismiss as to him for the reason that the proof varied materially from the allegation. The motion was denied. Defendant, J. K. Miller, was found guilty and a fine of \$100 was assessed against him.

It is admitted by the stipulation upon which the cause was heard, that defendant, J. K. Miller, was not guilty of the particular offense charged in the complaint, and that if he was guilty at all it was of another and a different offense. But it is contended by plaintiff's counsel that proceedings in cases of this kind are informal, that no written complaint or affidavit is necessary, but that where one is made, it is sufficient if it state generally that the ordinance or some section thereof has been violated by the defendant, without specifying in what the violation consists, and that the specification of a particular act done by the defendant, being unnecessary, should be rejected as surplusage. In support of this proposition we are cited to *City of Durango v. Reinsberg*, 16 Colo. 327 ; *Miller et al., v. Sparks*, 4 Colo. 311. Neither of these cases is authority for the position which plaintiff takes. In *City of Durango v. Reinsberg*, the complaint was almost exactly like the one before us. It charged the defendants with violating an ordinance of the city of Durango, by keeping open his place of business on a certain Sabbath day, and the display and sale of goods after 9 o'clock of said day. Just

as is done in the complaint in this case, it charged the violation of the ordinance, and set forth the act which constituted the violation. All that the court held in that case was, that it was sufficient to state in the complaint or affidavit the number of the section and title of the ordinance violated, together with the date of its passage; without setting forth the section or ordinance in full, or the substance thereof, as provided by section 114 of the Towns and Cities Act, chapter 109, General Statutes, 1883. As to the form of the complaint, this is as far as the court went. It held that complaint good, but it did not decide whether anything less than that complaint contained would be sufficient or not. The case of *Miller et al., v. Sparks*, is not in point. It simply holds that where no prior demand is necessary to be averred, it need not be proven. It would be surplusage, because the other facts set forth in the complaint would show that it was immaterial. But in a case in which a prior demand is required, it must be made and pleaded.

It is true that an action for a violation of an ordinance may be commenced by ordinary summons, without any form of pleading; but where a warrant issues in the first instance for the arrest of an offender it must be upon affidavit. While the affidavit need not set forth the ordinance or section the violation of which is charged, in any manner different from that which is provided by statute, yet it must charge a violation of the ordinance. Mill's Ann. Stat. sec. 4435. The affidavit must of course be in writing. Whether the form of the complaint or affidavit suggested by plaintiff's counsel would be sufficient, it is not necessary now to determine. An affidavit in that form is not before us. The complaint and affidavit in this case charge a violation of the two sections mentioned, but in express terms they limit and confine the alleged violation to a particular act which is specified. The breach of the ordinance consisted in the doing of one particular thing. The specification of the particular manner in which the ordinance was violated is a limitation upon the

general charge of violating the ordinance. It is not surplusage or immaterial matter, or pleading evidence. It would not be stricken out on motion of the defendant. Under a complaint of this character, can the plaintiff be permitted to abandon the charge which he has specifically made, and prove any other offense against the ordinance to which he may be able to find witnesses to testify? We think not. One of the objects of the complaint, or affidavit, is to advise the defendant of what he will be called upon to meet, and the complaint having been made in this form, and the arrest of the defendant under it procured, plaintiff is bound by it, and must confine the proof to its averments.

It being admitted by the stipulation filed, that the defendant was not guilty of the charge contained in the complaint, the motion to dismiss the action should have been allowed.

The judgment of the court below is therefore reversed.

Reversed.

THE UNION PACIFIC RAILWAY COMPANY, APPELLANT,
v. HEPNER, APPELLEE.

1. PRINCIPAL AND AGENT.

The statements and representations of an agent made in reference to an act which he is authorized to perform, and while engaged in its performance, are binding upon the principal. They are part of the *res gestæ*.

2. PRESUMPTIONS.

The statements contained in letters written or indorsements and memoranda made upon freight or expense bill, by agents of railroad company, in the course of search for goods lost in transit, and having reference to the search, are the statements of the company, and it is bound by all the inferences which legitimately result therefrom.

3. EVIDENCE—PRESUMPTION.

It being in the power of a railroad company to ascertain whether or not it had received goods for shipment, it is presumed to have as-

certained that fact, and its failure to deny—except by way of answer to the complaint—that the goods were so delivered, is evidence of some weight that it had received them.

4. PRESUMPTION.

A lot of goods shipped together and embraced in the same way-bill, part of which were delivered to consignee, and part not, raises the presumption that the entire lot was received by the company.

Appeal from the District Court of Arapahoe County.

Messrs. TELLER & ORAHOOD, for appellant.

Messrs. ROGERS, SHAFROTH & WALLING, for appellee.

THOMSON, J., delivered the opinion of the court.

On the 24th day of August, 1889, R. Hepner, the plaintiff below, delivered to the Montana Central Railway Company at Helena Station, Montana, four boxes of dry-goods, one roll of bedding and one bundle of clothing, consigned to A. Bohmer, at Denver, Colorado. The goods were the property of the plaintiff, and Bohmer was her agent at Denver to receive them. It is averred that these goods were delivered by the Montana Company at Butte, Montana, to the defendant, The Union Pacific Railway Company, to be by it transported to Denver, and there delivered to the consignee. On September 13, 1889, plaintiff received from defendant at its freight depot in Denver, the four boxes of dry-goods, but the roll of bedding and the bundle of clothing do not seem to have reached their destination. The freight on the shipment was prepaid at Helena, and a bill of lading given by the Montana Central Railway Company, which acknowledged the receipt of the goods.

About the 13th day of September, 1889, plaintiff presented this bill of lading at the defendant's office in Denver, and received from the clerk in charge a paper which witness terms "an expense bill," and of which the following, with the exception of some memoranda subsequently made, and which will be noticed hereafter, is a copy.

“ Denver Station, 9, 11,—1889.

“ A. Bohmer, to The Union Pacific Railway Company, Dr.

“ For Freight from Butte, via.

All claims for overcharge and loss or damage must be sent to A. S. Van Kuran, Freight Auditor, Omaha, Neb., with this expense bill and original bill of lading.

	ARTICLES.	WEIGHT.	RATE.	FREIGHT.
Pro. No. 5631.				
W. B. No. 201.	4 Bx. D. Goods			
Date W. B. 8-27.	X			
Car No. 553.	1 Roll Bedding	600	200	Paid.
Whose car.	X			
Consignor.	1 Bdl. Clothing			
M. C. Ry. Helena.				
W. B. 662.-8-27.	X Short.			

This expense bill was immediately taken to the delivery department and presented to the delivery clerk, who delivered the four boxes of dry-goods, and reported the other packages “short.” He took the expense bill, marked “X” above “Roll Bedding,” and also above “Bdl. Clothing,” and below made the memorandum “X Short.” On the face of the bill he wrote in pencil “Del’d, 9—13, ’89. Glanding P. Paid 1248.” These goods could not be found. Plaintiff made several ineffectual efforts to get the missing goods, by inquiring at the freight office and at the general office, and was finally informed that the defendant was trying to find them.

About November 16, 1889, Bohmer, the consignee and agent of plaintiff, received the following letter :

“ Union Pacific Railway, Traffic Department. D. B. Keeler, Assistant General Freight Agent.

“ DENVER, Colo., Nov. 16, 1889.

“ Mr. A. BOHMER, No. 913 Larimer Street, Denver.

“ Dear Sir : I have just received word from our freight claim office in Omaha that they have been unable to locate the roll of bedding and bundle of clothing shipped by you from Butte, August 27th. Such being the case, you had better make

claim for loss, attaching paid freight bill and original bill of lading to your itemized bill.

“Yours truly,

“D. B. KEELER,

“per S. G.”

“C—Claim 38.

In accordance with its suggestions, plaintiff made claim of loss, and after the claim was made, the freight bill, or “expense bill” as witness called it, was returned to her with the following memoranda stamped on the face of the bill with rubber stamp:

“Correct, A. S. Van Kuran, Freight Auditor, per. . . .”

“Union Pacific Railway, 112002, Omaha, Neb.”

“Union Pacific Railway, Freight Auditing Dept., K. 14716.”

“Asst. Claim Agent, Denver Colo.”

“Union Pacific Railway,—

Paid.”

“Sep. 13, 1889, Geo. E. Smith, Agt. Denver, Colo.”

Afterwards, about December 31, 1889, Messrs. Rogers, Shafroth & Whitford, attorneys for plaintiff, received the following letter:

“Union Pacific Railway, Traffic Department. D. B. Keeler, Assistant General Freight Agent.

DENVER, Colo., Dec. 31, 1889.

“Messrs. ROGERS, SHAFROTH & WITFORD, Attorneys, City.

“Dear Sir: Referring to your esteemed favor of the 26th inst., relative to the matter of the claim of R. Hepner against this company for bale of goods shipped from Butte, Mont., beg to advise you that we are investigating and endeavoring to locate the missing freight, and will advise you the result as soon as we can get our papers back, which are now out on the road.

“Trusting this will be satisfactory, I remain,

“Yours truly,

“H. A. JOHNSON,

M.”

“M-S-Claim.

Both of the letters were objected to for immateriality and

irrelevancy. The missing goods were never received by the plaintiff.

The defendant introduced no evidence except on the question of the value of the property.

It is urged that there was no evidence that the goods in controversy ever came into the possession of the defendant. The Montana terminus of the Union Pacific Company is at Silver Bow. The distance between Butte and Silver Bow is seven miles, spanned by a railroad called the Montana Union Railway. Whether this seven mile railroad is operated by the defendant or not, does not appear; but we find that the expense bill furnished by the defendant, is headed with the words "For freight from Butte," and embraces not only the four boxes of dry-goods, which were delivered to the plaintiff, but the roll of bedding and bundle of clothing which were not delivered. It refers to way bill No. 201, dated August 27. What this way bill was is not disclosed, but it was probably the defendant's own way bill, made on receipt of the goods from the Montana Central Railway Company. It certainly was not the way bill given by the latter company when the goods were originally shipped at Helena, for that bill bears date August 24. On the face of the expense bill is stamped "Correct, A. S. Van Kuran, Freight Auditor."

This memorandum was made while the expense bill was in possession of the company, for the purpose of aiding it in tracing the property. The fair inference from the words at the head of the bill of expense, and the memorandum "Correct," would be that the goods had been in fact received by the defendant, at Butte, Montana; and that inference is strengthened by the declarations of the defendant's agents and officers while engaged in a search for the property. The two letters read in evidence are objected to as immaterial and irrelevant, but we are unable to agree with the learned counsel in that objection. The statements and representations of an agent made in reference to an act which he is authorized to perform, and while engaged in its performance, are binding upon his principal. They are part of the *res gestæ*. These letters

were written and the memoranda on the expense bill were made by the company's agents, while they were endeavoring to find this property, and they have reference exclusively to the act in which they were then engaged. The statements which they contain are, therefore, the statements of the defendant itself, and the defendant is bound by all the inferences which legitimately result from the statements. The stamp on the face of the bill is that it is "correct" and if it is correct then the defendants received the goods.

The first letter contains the following words, "That they have been unable to locate the roll of bedding and bundle of clothing shipped by you from Butte, August 27th." Here is at least an implied admission that the defendant received the goods at Butte. But even if nothing affirmative upon the subject could be found in either letter, yet both are apparently written upon the hypothesis that the defendant had received the goods and lost them; and it is certainly a matter of some significance, that until the filing of the answer, there is not either in the letters or elsewhere a denial that the goods had been delivered to the company. As to whether or not they had been so delivered, the defendant possessed the means of ascertainment. It would have been a matter of no difficulty for it to discover whether the goods came into its possession; and when it was notified of their loss, it is presumable that the very first step it took was to see whether it ever had them. If it had found that it had never received the goods, that would have ended the investigation. It is fair to assume that the company pursued this course, and the very fact that none of its agents or officers, engaged in the pursuit of the property, ever claimed that the company had not received it, is evidence of greater or less weight that it actually had received it. There are circumstances under which a failure to deny is equivalent to a positive admission.

Again: A portion of the shipment was received by the plaintiff. It had been received by the defendant from the Montana Central Railway Company, and was brought over its line to Denver. All of the goods had been shipped to-

gether and embraced in the same way bill. Part came through and part did not. In such case the presumption is that the entire property received by the first line was delivered by it to its connecting line, and that the loss occurred while the property was in the custody of the last line. The difficulty, if not impossibility of the ascertainment by the plaintiff of the actual facts, and the ease with which by means of the knowledge in its possession the defendant could ascertain them, renders this presumption necessary to avoid a denial of justice. Hutchinson on Carriers, § 761; *Laughlin v. C. & N. Ry. Co.*, 28 Wis. 204.

In view of the foregoing we cannot say that there was no evidence of the delivery of the goods to the defendant, especially when we consider that all the means of knowledge upon the subject were within the defendant's possession, and were inaccessible to the plaintiff.

The first instruction asked by the defendant is fully covered by the instructions given. The second, inasmuch as it informs the jury that the plaintiff failed in her proof, was properly refused.

The record discloses no error. The judgment of the court below must therefore be affirmed.

Affirmed.

FISK, APPELLANT, v. THE GREELEY ELECTRIC LIGHT
COMPANY, APPELLEE.

1. AGENCY.

A person who is employed to manage a hotel is a general agent within the scope of the employment, and his principal is bound by his transactions properly pertaining to that business, but not by his acts beyond these limits.

2. SAME.

The manager of a hotel, to incur any responsibility on behalf of his principal for the removal of old apparatus and fixtures, and replacing them with new, must have special authority from him for that purpose.

3	319
10	331
10	535
11	280
12	74
12	363
25c	13
3	319
14	48
8	319
17	447
18	485
3	319
20	122

3. INSTRUCTIONS.

Instructions should in all cases be based upon the evidence, and an instruction that impliedly assumes the existence of evidence that was not given, is erroneous.

4. SAME.

An instruction couched in such general and indefinite terms that the jury might easily draw an unwarranted inference from an admitted fact, is vicious.

Appeal from the District Court of Weld County.

Messrs. ROGERS, SHAFROTH & WALLING, for appellant.

Mr. H. N. HAYNES, for appellee.

THOMSON, J., delivered the opinion of the court.

In November and December, 1890, Archie C. Fisk was the proprietor of the Oasis Hotel, in Greeley, Colorado. From November 10th to December 10th, the hotel was in charge of Mrs. Shear as the agent of Fisk. Under an agreement between Mrs. Shear, purporting to act as Fisk's agent, and the Greeley Electric Light Company, the company replaced the electric light wires in the hotel, and the other apparatus, material and fixtures necessary for the lighting of the hotel by electricity. The work was commenced about the 20th of November, and completed about the 20th of December. Fisk refused to pay the company for the work and material, and it brought this suit against him, resulting in a judgment in its favor for \$510. From this judgment, defendant appeals to this court.

The errors assigned relate exclusively to the giving and refusing of instructions. At the request of plaintiff, the court instructed the jury as follows:

"1. If you believe from the evidence that the defendant in this case authorized the work to be done, either personally or through an agent, then the defendant is liable for the value of the work done.

"2. If you do not believe that the defendant authorized

the work, but you still believe that at any time during the progress of the work he was present, and saw the work going on, and made no objection to the continuance of the work, and no protest against its being done, you are instructed that that was a ratification of the original contract, if any was made, and that the defendant is liable for the value of the work done."

"3. You are further instructed that if the defendant did not authorize the work, or if he was not present when the work was being done, yet if, after the work was completed, he signed a note covering the alleged value of the work done, knowing that the note was for that purpose, that that was a ratification, and the defendant is liable."

"4. You are further instructed that if the defendant gave his agent authority to have the building wired, that he is now liable for the reasonable value of the work actually done."

The instructions are not numbered in the record. The numbering is ours for our own convenience in considering them.

The first instruction states a proposition, which in the abstract is perhaps correct, but in view of the evidence in the case it is misleading, and very probably had that effect upon the jury. The entire evidence is, that the defendant did not contract for the work personally. There is no claim or pretense that he did; but it was conceded at the trial that he had an agent, and that that agent was Mrs. Shear. He so testified himself, as did also Mrs. Shear; and it was under an agreement with Mrs. Shear, that the defendant did the work. Now, under that instruction, worded as it is, the jury might well conclude that it was their duty to find their verdict for the plaintiff, and that it was unnecessary to consider any of the other evidence in the case. Mrs. Shear was the defendant's admitted agent; it was through her that the work was authorized, and in the absence of any instruction from the court upon the subject, the question of the extent of her authority and of her power to bind the defendant in the matter of this contract,—questions which are vital to a just

determination of the cause,—did not probably receive any consideration at their hands.

Mrs. Shear was the agent of defendant to manage the Oasis Hotel, according to her statement, or, as defendant puts it in his testimony, she was employed to run the hotel, which means the same thing. Within the scope of her employment her agency was general; she had the right to purchase the necessary supplies; to buy suitable and appropriate goods for use in the hotel; to collect and receive the moneys due from guests, and to do all such things as are usual or necessary in the conduct of the business with which she was entrusted. *Banner Tobacco Co. v. Jennison*, 48 Mich. 459; *Schmidt v. Sandel*, 30 La. Ann. 353; *Beacher v. Venn*, 35 Mich. 466; *Cummings v. Sergeant*, 9 Met. (Mass.) 172.

Her authority as agent was confined to the business of the hotel, and by any of her transactions in matters properly pertaining to that business, her principal was unquestionably bound. But beyond those limits, as mere manager of the hotel, she was not the defendant's agent at all. To incur any responsibility for him outside of the management of the hotel business proper, she must have special authority from him for that particular purpose. She could not tear down the walls of the building and erect others in their place; she could not cover the house with a new roof; she could not remove the furniture and fixtures, and involve him in debt for other articles of like character to be used in their stead; she could not do any act which might operate to create a lien upon the real estate. None of these things would be carrying on the business of a hotel. The removal of the old electric wiring apparatus and fixtures and replacing them with new, were not within the authority which she possessed as manager.

It might be gathered from the testimony of Mrs. Shear that, independently of her agency as manager, she had a special authority to contract for this work. In so far as her statement tended in this direction she was positively and unequivocally contradicted by the defendant; and the question

as to whether she was so specially authorized, ought to have been submitted to the jury by an instruction properly framed for that purpose. The instruction given is couched in such general and indefinite terms, that a jury might very easily infer that under the agency, which was not controverted, the authority existed to cause the work to be done, and the vice is not cured by any other instruction given.

Neither the second nor the third instruction is based upon any evidence in the case; no witness swears that the defendant at any time during the progress of the work was present and saw it going on. Indeed, from the testimony of plaintiff's witnesses alone, it is extremely improbable that such was the case; while defendant denies with great emphasis that he ever saw it, or knew anything whatever about it, until long after it was completed. Neither is there any evidence that he ever signed a note covering the alleged value of the work done, knowing that the note was for that purpose. The only testimony as to the execution of the note is that of the defendant himself. Sometime near the last of November, 1890, he being about to go out of the city, signed a note in blank, for the purpose of renewing a note he owed at the bank, and left it with his clerks. He was away a portion of December and part of January, and was sick and incapacitated from doing business during February. The note signed in blank was not used in renewal because the bank note was paid. A note for the amount of its claim dated February 1, 1891, had been sent to the plaintiff but was not satisfactory, the plaintiff claiming that it should have borne date January 1st, and drawn 12 per cent instead of 8 per cent interest. It was returned to defendant, and neither it nor another in its place was ever sent back to the plaintiff. Defendant says that the notification given to him of the return of this note was the first intimation he had of the doing of the work in question; that he never signed any note on account of the work, and that he knew that the note which was returned to him was the blank note which he had signed, because it was the only note he had signed in blank. He not only did not

sign the note for the purpose of paying for this work, but until the note which he had signed in blank, for an entirely different purpose, came back to him filled up, he was ignorant that any such work had been done.

The instructions should in all cases be based upon the evidence, and an instruction, no matter how correct the principle which it may announce, that impliedly assumes the existence of evidence which was not given, is erroneous. It is calculated to bewilder and mislead the jury by producing the impression that in the mind of the court, some such state of facts as the instruction supposes, may be inferred from the evidence given, or concealed within it. The authorities upon this proposition are numerous and uniform. *Breeze v. State*, 12 Ohio, N. S. 146; *Ely v. Tallman*, 14 Wis. 28; *Hill v. Canfield*, 56 Pa. St. 454; *Atkins v. Nicholson*, 31 Mo. 488; *Bensley v. Brockway*, 27 Ill. App. 410.

The fourth instruction is as objectionable as the first. An agency and an authority are referred to in general terms, but it leaves the jury to infer what agency and what authority, are meant. It affords them no aid in distinguishing between the general agency which was acknowledged, and the power of the agent under it, and a special agency which would have warranted the contract.

As the judgment of the court below must be reversed for the reasons given, it will be unnecessary to notice the instructions asked by defendant, and refused by the court.

Reversed.

ANDERS, APPELLANT, v. BARTON, APPELLEE. .

1. STATUTE OF FRAUDS.

A sale of chattels not followed by an actual and continued change of possession, is void as against the creditors of the vendor.

2. SAME.

The giving and recording of a chattel mortgage by the vendee of chattels

to whom possession thereof was not given, does not take the sale out of the operation of the statute.

Appeal from the District Court of Arapahoe County.

AN action in replevin to recover the possession of office furniture, pictures, library, etc., being the furniture, appliances, library in a doctor's office.

It appears that G. K. Hassenplug was a doctor, a specialist in some diseases, had been in the practice of his profession for several years in the city of Denver, having his office in the same building during the entire time; that Frank A. Hassenplug was the brother and assistant, having his office with him. At the time this controversy arose the brother had been but a few months in the office.

Appellant was the brother-in-law of the Hassenplugs, and a salesman in a commercial house in the city. Appellee was the sheriff of Arapahoe county, and by virtue of a writ of attachment in the suit of Sydney B. McClurken v. G. K. Hassenplug, levied upon and took possession of the property in controversy. It is claimed by appellant that the chattels in controversy were, by G. K. Hassenplug, sold and transferred to his brother, F. A. Hassenplug, for a valuable consideration and became his property; that also for a valuable consideration the property was sold and transferred by Frank A. Hassenplug to the appellant.

A complaint in the ordinary form under the Code was filed, to which appellee answered, setting up his official position, the suit of McClurken v. Hassenplug, and having taken the goods upon attachment and justified under such writ, denying the ownership of the goods by the appellant, and affirming the title to have been in G. K. Hassenplug.

In the second answer is a further averment that appellant claims the goods by reason of a sale from Hassenplug to him; that if any such sale or assignment was made, "it was not accompanied by an immediate delivery of said goods and chattels, or any delivery thereof. That there has never been any actual and continued change of possession of said goods and

chattels." Further, "that said conveyance, or assignment of said goods and chattels, were made with the intent to hinder, delay and defraud said McClurken, one of the creditors of said Hassenplug, of his lawful suit and said debt. That no consideration was paid by said Anders to said Hassenplug for said goods and chattels, nor to any one else. That said transfer and conveyance to said Anders was simply a cover and subterfuge, and the said Anders has not and never had any interest whatever in said goods and chattels, but this defendant alleges that he took said transfer, if at all, with the intent to delay and defraud said McClurken."

A replication was filed, traversing the special allegations contained in the answer. The issues so made were tried by the court without a jury, resulting in a judgment for the defendant, and an appeal prosecuted to this court.

Mr. ROBERT E. FOOTE, for appellant.

Messrs. DOWD & FOWLER, for appellee.

REED, J., delivered the opinion of the court.

Counsel for appellant relies in argument upon five assignments of error. Upon examination it will be found that the five can be consolidated into one—that the court erred in finding for the defendant. The solution depends entirely upon the evidence, and the cardinal facts are undisputed.

G. K. Hassenplug was the original owner of the property, and had been for an indefinite time. He transferred it or attempted to, by a bill of sale to his brother; he claimed for a cash consideration of \$1,000, but still retained the possession. Being pressed for a security for an indebtedness, and not wishing the name of Hassenplug to go upon record as a mortgagor, as it might impair credit, the parties cast about for some escape. It is first contemplated to make the title to the chattels over to a young lady, a typewriter in the office, but she being found to be of the tender age of fifteen years

it is abandoned—then appellant is selected. Frank A. Hassenplug made a bill of sale to him, and he immediately executed a chattel mortgage to secure the debt of G. K. Hassenplug, and united with him in making the note. The possession continued to remain in G. K. Hassenplug up to the time of levying the attachment. The claims of the mortgagee are not involved in the controversy.

It is claimed by appellant that both of the Hassenplug brothers were indebted to him for board, and that the two bills was the consideration by him paid for the property. If such was the case it was unfortunate that he should, at once, be required to convey the property by mortgage to secure the debt of G. K. Hassenplug. Saying nothing of the shuffling, evident collusion and doubts thrown over the *bona fides* of the two sales, it is evident that the judgment of the lower court must be affirmed. It is not claimed that any possession was ever delivered to either of the supposed purchasers.

Our Statute of Frauds & Perjuries, Vol. 1, p. 1247. sec. 2027, Mill's Ann. Stat. is as follows: "If no delivery and no change of possession, void. Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive."

The statute and its construction in *Cook v. Mann*, 6 Colo. 21, *Wilcox v. Jackson*, 7 Colo. 521, and *Bassinger v. Spangler*, 9 Colo. 175, are conclusive of this case.

Nothing appears in *Sweeney v. Coe*, 12 Colo. 485, or *Herr v. M. & M. Co.*, 13 Colo., 406, cited by counsel, to modify or in any way change the former decisions cited. The statute itself is so plain and unequivocal, no interpretation or construction is required.

It is claimed by the learned counsel that the mortgaging

of the property by appellant and the recording of the mortgage, took it out of the operation of the statute by giving notice of the ownership, etc. We cannot see how it in any way affected it. If neither F. A. Hassenplug nor appellant had any title, appellant could not make one by executing and recording a mortgage of that property, any more than he could of the property of any other person. How would the making and recording of a chattel mortgage of a long list of chattels by appellant, be notice to anybody of the identity of the chattels with those in the possession and use of G. K. Hassenplug? If, as contended, the mortgage and recording was notice, they would be no notice that they were the goods in controversy; the legal supposition being that possession was in the mortgagor.

The judgment will be affirmed.

Affirmed.

8 328
d32s 361
d32s 362

BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY,
PLAINTIFF IN ERROR, v. LAW, DEFENDANT IN ERROR.

1. STATUTORY CONSTRUCTION.

A penal statute must be strictly construed.

2. SAME.

The intention of the legislature in enacting, sec. 2537 Gen. Stats., was to punish any person who, knowingly and intentionally, caused a pauper to be taken from the county where domiciled and transported to another, with the knowledge and intention of relieving the county of domicile from a charge of support, and making the person a charge upon the other county.

3. SAME.

In order to warrant a conviction under this statute it must appear beyond controversy that the person was a pauper within the legal definition of the word, had legal domicile in the county from which the removal was made, and not in the county to which he was taken or sent, and a knowledge of the facts by the person charged from which the intention, if not expressed, could legally be implied.

4. INTENTION.

In cases under this statute intent is an element of the offense.

Error to the District Court of Pitkin County.

Messrs. WILSON & SALMON, for plaintiff in error.

Mr. D. E. Parks and Mr. PHIL. O'FARRELL, for defendant in error.

REED, J., delivered the opinion of the court

This action was brought to recover a penalty of \$200 for an alleged violation of the provisions of sec. 2537 Gen'l Stats., as follows:—

“If any person shall bring and leave any pauper or paupers in any county in this state, wherein such pauper is not lawfully settled, knowing him or them to be paupers, he shall forfeit and pay the sum of two hundred dollars for every such offense, to be sued for and recovered, by and to the use of such county, by action of debt, before any court having competent jurisdiction; and the suit may be brought in the county where the pauper was so brought and left, and the process may be directed to and served by any proper officer in any county of this state.”

Prior to October 10, 1890, Ellen Crandall was a resident of Aspen, Pitkin county, and, it appears, had been self-supporting—had a daughter married and settled at that place. About the date mentioned she sold out her limited effects, receiving about \$40.00. She and Mrs. Skane went to Leadville, Lake county, opened a laundry and prosecuted the business until the latter part of January, '91, or first of February, when she was taken sick, used up her means and applied to the county authorities for assistance; defendant was the officer in charge of the charity department. Sometime, probably early in February, she applied to the defendant for transportation to Aspen, which she obtained, visited her daughter for a day or two, then applied to the officer of Pitkin county for assistance, was by him sent back to Lake county, where she remained until March 4th, when she again applied to the defendant and obtained transportation back to Aspen. After her return she became a charge upon the county of Pitkin, and this suit was brought. It was tried by the court with-

out a jury, resulting in a judgment for the defendant, and this appeal prosecuted.

The statute is penal and must be strictly construed. The obvious intention of the legislature was to punish any person who knowingly and intentionally caused a pauper to be taken from the county where domiciled, and transported to another with the knowledge and intention of relieving the county of domicile from the charge of support, and making the person a charge upon the other county. In order to warrant a conviction it must transpire, beyond controversy, that the person was a pauper within the legal definition of the word; had legal domicile in the county from which the removal was made, and not in the county to which taken or sent—and a knowledge of these facts by the person charged, from which the intention, if not expressed, could legally be implied. In all cases of this character the intention is an important element of the offense. In this case the questions were of facts principally, although had the other facts been found against the defendant, the question of domicile might have required a determination. The testimony upon one important point was conflicting, the defendant and his assistant testifying to the woman's statement, that having a daughter and friends in Aspen she would not become a public charge. This was denied by the woman Crandall; otherwise there was no material conflict of evidence.

The evidence was not sufficiently conclusive and determinate to establish the statutory offense. The finding and judgment of the court should not be disturbed.

Affirmed.

SEARS, PLAINTIFF IN ERROR, V. HICKLIN, DEFENDANT IN
ERROR.

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15	51

1. LIMITATIONS—NEW PROMISE.

The principle upon which a part payment by a debtor will prevent his availing himself of the bar of the statute is, that such a payment amounts to an acknowledgment of the debt, and from an absolute acknowledgment the law implies a new promise founded upon the old consideration.

2. SAME.

To raise such implied promise, the payment must be voluntary, and by the debtor to the creditor.

3. SAME.

A general admission of indebtedness is insufficient to raise such implied promise. There must be no uncertainty as to the particular debt to which the admission applies, and it must be positive and unconditional.

Error to the District Court of Pueblo County.

Messrs. URMY & CRANE, for plaintiff in error.

Mr. C. E. GAST, for defendant in error.

REED, J., delivered the opinion of the court.

On July 10, 1889, this action was commenced by the plaintiff to recover the amount of a promissory note made by the defendant for \$1213.08 on the 23d of November, 1881, payable six months after date with interest at one per cent per month from date until paid, to which the defendant pleaded the statute of limitations.

A lengthy replication was filed, stating in substance that the parties had mutual dealings and accounts in matters in no way connected with the note, in the years 1885 and 1886; that no settlement or adjustment of accounts was had between the parties; that if there had been it would have been shown that there was on the first of October, 1885, twenty-

five dollars due the defendant, and on the first day of April, 1886, a further sum of \$87.50, making in all \$112.50, that might or should have been indorsed as payments at those dates respectively, as all dealings in other matters had closed between the parties prior to those notes. "That the reason why said sums * * * were not credited upon the note was, that no settlement had been made" etc., closing with the offer to make the credits upon the note at that time. A demurrer was filed to the replication, which was sustained, and the judgment upon the demurrer is assigned for error.

The judgment was not erroneous, nothing contained in the replication could be construed as a payment upon the note or as a promise. It is not stated that the defendant ever ordered such balances to be indorsed as payments upon the note or even knew of there being such balances due her, as it is stated in the replication that no settlement was made. There was no payment. The fact that there was money in the hands of plaintiff arising from other transactions which might have been applied, is not sufficient. The principle upon which a part payment by a debtor will prevent his availing himself of the bar of the statute is, that such payment amounts to an acknowledgment of the debt, and from an absolute acknowledgment the law implies a new promise founded upon the old consideration. To raise such implied promise, the payment must be voluntary; made by the debtor to the creditor. "It must be shown to be a payment of a portion of an admitted debt and paid to, and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder." Wood on Limitations, 222; *Linsell v. Bonsor*, 2 Bing. 241; *Tippets v. Heane*, 1 Cr. M. & R. 252; Banning on Lim. 64-65; *Cross v. Moffatt*, 11 Colo. 212; *Toothaker v. Boulder City*, 13 Colo. 227.

It will readily be seen how far short the facts pleaded came from removing the bar of the statute.

It is also urged that the court erred in its instructions to the jury. They were as follows :—

“There is but one question for you to determine in this cause, that is, did the defendant in this cause within six years prior to July 10, 1889, promise positively and unconditionally to pay the note sued on in this action; as to this issue the burden is on the plaintiff, and if he fails to make out said issue by a preponderance of the evidence, then you should find for the defendant. If the plaintiff so establishes this issue by a preponderance of the evidence then you should find for the plaintiff.

“It is not a question whether the note was originally a just one, or whether it has been paid either by money or by other transactions between the parties; the law presumes that it is paid unless there is a new promise to pay of the character set forth in the preceding instruction.”

The instructions are very brief, which is highly commendable, if they properly embrace all the law applicable to the case. We cannot agree with the contention of plaintiff's counsel. Upon the face of the note it was apparent that it was barred by the statute. The presumption of law was that it had been paid. The bar was pleaded, and could only be overcome by a replication and proof of a new promise to take it out of the statute. It matters not whether the promise is direct, or legally implied, or inferred from the fact of a partial payment having been made. In either case it is only the promise that can defeat the statutory bar. The replication having been properly disposed of on demurrer, the only reliance was in the proof of a direct promise to pay; hence, the issue to be tried was, as stated by the court, “did the defendant within six years, promise to pay the note.” Upon that issue the burden of proof was upon the plaintiff. The language of the instruction was, “promise positively and unconditionally to pay the note sued on in this action.” It is to this that the criticism of counsel is directed. In commenting upon it counsel say: “If we understand the proper interpretation of this instruction, it is, that there must

have been a *positive and unconditional promise made by defendant to plaintiff, to pay the note sued on, within six years, etc.*; the promise is so limited that this particular note must have been mentioned at the time the promise was made.

“Under the above instructions there can be no stretch of the finding of the jury,—they are bound by this little narrow instruction. They must first have found that there was on the part of the defendant a *positive and unconditional promise to pay the identical note* sued on before they could find for the plaintiff. This is certainly hiding the light of the law under a very small bushel, and shutting out every possible opportunity of justice entering into the verdict of the jury.”

I can see nothing incorrect in the instruction. Although, after a new promise, the action can be maintained upon the original consideration, recovery can only be had upon the new contract to pay, hence, it must have the necessary elements of a contract. It must be a full recognition of the indebtedness evidenced by the note, and a promise to pay that particular debt. It was very proper that the promise should have been required to be so limited as to apply to the particular note, a general admission of the indebtedness would not answer the purpose. The rule is well settled that “there must not be any uncertainty as to the particular debt to which the admission applies. It must be so distinct and unambiguous as to remove all hesitation in regard to the debtor’s meaning.” Wood on Lim., § 68; *Palmer v. Gillespie*, 90 Pa. St. 363; Banning on Lim., 65; *Tippets v. Heane*, (*supra*).

In regard to the strictures or criticism made as to the character of the promise that it must be “*positive and unconditional*” the charge appears warranted by the authorities.

In *Bell v. Morrison*, 1 Pet., (U. S.) 351, Judge Story said:—“And if the bar is sought to be removed by a new promise, that promise, *as a new cause of action*, must be proved in a clear and explicit manner, and be *unequivocal and determinate*.” It is clear, that if, as stated, the promise cre-

ates a new contract, it must be absolute, definite and unconditional.

In discussing the instruction, *Toothaker v. Boulder City*, *supra*, is cited as sustaining the position of counsel that the charge was erroneous. We cannot so regard it, but regard it as being directly in line with the authorities, both English and American. The court says: "The generally accepted doctrine, at the present time, in the absence of special legislation, is to the effect that while a new promise will overcome the plea of the statute, in actions on simple contracts, the promise, if express, must be *positive* and *unequivocal*." Numerous other authorities might be cited, but it is deemed unnecessary. The reliance was upon a supposed express promise, creating a new contract. It was the only issue involved, and to this condition the instruction was properly directed. The jury found as a fact that there was no promise, and that was conclusive of the case.

The judgment must be affirmed.

Affirmed.

TABOR ET AL., APPELLANTS, v. SALISBURY, APPELLEE.

1. AGISTOR'S LIEN.

It seems that the lien of an agistor, which had its inception prior to the giving of a chattel mortgage upon the property, which is taken with knowledge of the situation of the stock, is superior to that of the mortgage.

2. SAME.

Where the stock was not entrusted to the ranchman to be fed, but remained in the custody of the owner, and the ranchman simply sold the feed which was consumed by the animals, and had no other custody of them than that which flowed from permission to use his yards for feeding purposes, he has no lien.

Appeal from the District Court of Delta County.

Mr. OLIVER B. LIDDELL, for appellants.

Mr. JOHN GRAY, for appellee.

BISSELL, P. J., delivered the opinion of the court.

If the facts which the evidence tended to establish are to be taken as true under our rule, because they rest on the verdict of a jury, there is no error in this record.

In 1890, Sheridan Seaman was the owner of the property which is the subject-matter of this dispute. It consisted of a lot of horses and mules, which were used by him during that season in doing work on a railroad grade. When the season was over, this stock was sent in the care of W. L. Mears, to a ranch belonging to the appellee, Salisbury, to be fed and cared for during the winter. Whether the stock was delivered to Salisbury, and entrusted to him as an agistor to care for and feed, or whether the stock was in the custody of Mears, and Salisbury simply sold the hay on which they were fed, is the nub of the controversy. The stock arrived at Salisbury's ranch early in December, 1890, and was in his pasture and his yards from that time forward until the commencement of this suit. In Denver, on the 28th of January, 1891, Sheridan Seaman executed a mortgage to his father, Lafayette Seaman, and H. A. W. Tabor, to secure the payment of a promissory note bearing that date for \$2,500, due six months after date. At this time the property was on Salisbury's ranch, being fed from his stock of hay. This appears to have been known to the mortgagees. The instrument recites that the property is on a ranch at Delta, and the evidence tended to show that the parties had knowledge of the whereabouts of the animals. The stock remained at the ranch during the winter, and for the feed which they consumed, Salisbury, under the statute, Gen. Statutes 1883, § 2118, asserted a lien for what he claimed for their care during this period. In the enforcement of this lien a sale was started, but Lafayette Seaman and Tabor, to enforce their rights, commenced a replevin

suit to recover the property. Salisbury defended, and set up his right to retain possession until his claim was satisfied.

While many errors are assigned, but two are relied upon in argument, and they are the only ones of sufficient importance to justify consideration. It is insisted by counsel for appellants, that under the law the rights of the holders of a lien by mortgage are superior to the equities of other lienors, and must prevail over any which may be asserted by the agistor who receives and cares for stock. This troublesome question need not be determined. Strong and very persuasive arguments have been adduced by able judges, in support of their conclusion that the lien of him who feeds the cattle ought to prevail as against the mortgage, since the mortgagee has left the property in the possession of the one executing the security, who is thereby apparently clothed with authority to contract with reference to the stock, and his bargain in such a case has resulted in the preservation and betterment of the security which the mortgagee claims. Other judges contend, with much learning, that the agistor^a has notice of the existence of the security, and must be presumed to have contracted with reference to its probable enforcement. These controversies, however, have arisen where the security antedated the placing of the stock with the ranchman. It does not seem ever to have been held that where the lien of the feeder has had its inception prior to the giving of the security, which is taken with knowledge of the situation of the stock, such subsequent mortgage is superior in its equities.

Counsel have apparently recognized the difficulties of the situation, since their principal argument is addressed to the alleged error that the verdict of the jury is unsupported by the testimony. It may be conceded that on the evidence as it stands, very persuasive arguments might be constructed in support of the conclusion that the jury had misapprehended the full force and effect of the evidence, and had reached a result not wholly justified by the apparent preponderance of the testimony. That, however, does not concern us. If

there is testimony in the case on which the jury could rightfully render the verdict which they returned, an appellate court will not, save in a case clearly showing bias or prejudice, disturb the conclusion reached by the body to which is committed the power of determination. The jury were properly instructed. They were clearly and plainly told by the court that if the stock was not entrusted to the ranchman to be fed, but remained in the custody of the owner or his employees, and the ranchman simply sold the feed which was consumed by the animals, and had no other custody of them than that which flowed from the permission to use his yards for feeding purposes, the case was not within the lien statute as against the mortgagees. On the other hand, the court told them that if they found from the testimony that the stock was entrusted to the ranchman, and that it was in reality in his custody for the purpose of care during the winter, that then his lien would attach. On the simple issue thus plainly stated to the jury, they found for the ranchman, and it was adjudged that the plaintiffs were not entitled to recover the possession, except on payment of the amount which Salisbury claimed. It would subserve no useful purpose to prolong this opinion by a discussion of the evidence and an attempted justification of the verdict. It is sufficient to say that on the testimony the jury had a right to so find, and we are not at liberty to disturb their expressed judgment.

Since there are no errors in the record which require the reversal of the judgment, it will be affirmed.

Affirmed.

PERKINS, APPELLANT, v. WESTCOAT, APPELLEE.

1. CONTRACTS OF INFANTS.

Executory contracts of infants are voidable and not binding upon them, unless ratified after they reach majority. To this rule there are exceptions, among which are contracts for necessities under certain circumstances.

2. SAME.

Where an infant lives with his parents by whom he is supplied with necessaries, he can make no binding contract.

3. SAME.

Where an infant resides with his parents and they supply him with necessaries, not only is there no implied agreement on his part to pay for his support, but if one were expressly made he would not be bound by it.

4. PARENT AND CHILD.

The law imposes upon parents an obligation to support their children, and no indebtedness is created by the fact of such support.

5. SAME.

When a child continues to live with his parents after he has become of age, to entitle him to compensation for his services, or them to compensation for his maintenance, there must be an express contract for that purpose. The law implies none.

6. SAME.

Where the child is the owner of an estate, the father, if unable to furnish proper support, or the widowed mother, without reference to her ability, may in a proper proceeding have it applied to the maintenance of the child; but this proceeding must be in the court having jurisdiction of the estate.

7. SAME.

Upon the marriage of an infant daughter the obligation of her parents for her maintenance, and her obligation to render service, ceases; but, in the absence of an express promise, she is not liable to her parents to pay for maintenance furnished after marriage.

8. EVIDENCE.

Statements by a married daughter made to third persons that she intended, or expected to, or would pay her mother for taking care of her, are not evidence of a promise so to do.

Appeal from the District Court of Arapahoe County.

Messrs. MORRISON & FILLIUS, and Mr. THOMAS MITCHELL, for appellant.

Mr. W. J. EDWARDS, for appellee.

THOMSON, J., delivered the opinion of the court.

This is an action at law brought by Mary A. Westcoat to recover from Daniel E. Perkins, administrator of the estate

of Ella E. Perkins, deceased, the value of food, lodging, clothing etc., furnished by the plaintiff to Ella E. Perkins, between the 19th day of June, 1876, and the 13th day of May, 1890, less Ella's share of the income of an estate left by her father, which was collected by the plaintiff and credited to Ella.

There seems to have been no dispute as to the material facts of the case, which are these: Ella E. Perkins was the daughter of the plaintiff. The husband of plaintiff and father of Ella, E. C. Westcoat, died intestate in April, 1875, leaving as his sole heirs at law Ella E. Westcoat, W. E. Westcoat, a son, and the plaintiff. He died seized of real estate valued at \$2,060, and possessed of some personal property, which was all consumed in payment of the debts of the estate, and the expenses of administration. The real estate was left intact. At the death of E. C. Westcoat, his daughter Ella was ten years old. In 1880, when she was about fifteen years of age, she was married to the defendant, Daniel E. Perkins. The fruit of this marriage was a daughter, born in 1881.

From the death of her father, Ella lived with her mother, the plaintiff, until her marriage in 1880, when her husband was added to the family, both lived with the plaintiff until sometime in the year 1881, when the husband went to Middle Park, where he has since lived. Ella, and her daughter, after her birth, lived with the plaintiff until May, 31, 1890, when Ella joined her husband with her child. She died in July, 1890, and her husband, the defendant, was appointed administrator of her estate. The defendant contributed nothing to the support of his wife or child during the whole time that they lived with the plaintiff. The plaintiff furnished maintenance to her daughter Ella, and to the child after its birth, from the time of the death of E. C. Westcoat to the time when Ella joined her husband in Middle Park. Judgment was given for the plaintiff, from which the defendant appeals to this court.

The court in which the cause was tried seems to have pro-

ceeded upon the theory that because Ella E. Westcoat had inherited and was the owner of an estate, the fact of her support and maintenance by her mother, created a personal liability against her, or implied a promise on her part to pay the reasonable value of such support and maintenance. This is the theory upon which the several instructions given, and which we shall notice hereafter, are based, and upon its soundness or unsoundness depends the disposition to be made of the case here.

Although the complaint does not distinguish between the period before, and that after, the daughter's marriage, but treats the whole as one entire and continuing transaction, yet we conceive that such a distinction exists, and in endeavoring to ascertain the law applicable to the case we shall give each a separate consideration.

From her father's death to her marriage, Ella was an infant, living with her mother. The general doctrine is that the executory contracts of infants are voidable, and not binding upon them unless ratified after they reach their majority. But there are some exceptions, among which are contracts for necessities under certain circumstances, and which, when so made, are neither void nor voidable, but are obligatory, and cannot be disaffirmed. While an infant lives under the roof of his parents by whom he is supplied with such necessities, he can make no contract which will be binding upon him. It is when he is absent from home, not under the care of a parent or legal protector, that he will be held to his contracts, express or implied, for necessities, and this because if such contracts were subject to the general rule, and he were therefore deprived of credit, he might be unable to obtain food or clothing, though possessing the means by which he could, after a short time, pay for them. This exception is for the benefit of the infant himself.

But where the infant resides with the parent, and the parent supplies him with necessities, not only is there no implied agreement on the part of the infant to pay for his support, but if one were expressly made we do not think he

would be bound by it. Such an agreement does not fall within any exception governing the contracts of infants. The law imposes an obligation upon parents to support their children, and no indebtedness is created by the fact of such support. Even if children continue to live with their parents after they become of age, and competent to bind themselves by their engagements, still, to entitle the children to compensation for their services, or the parents to compensation for their maintenance, there must be an express contract for that purpose. The law implies none. Schouler's Domestic Relations, 372.

Where the child is the owner of an estate, the father, if unable to furnish proper support, or the widowed mother without reference to her ability, may in a proper proceeding in equity have it applied to the maintenance of the child, not on the ground of any liability to pay on the part of the child, but upon equitable principles, because in such case it is right that the estate should bear, or at least share the burden of the support. 1 Tamlyn, 22; *Newport v. Cook*, 2 Ashmead, 332; *Harring v. Coles*, 2 Bradf. 349; *Matter of Burke*, 4 Sanf. Ch. 619; *Halley v. Bannister*, 4 Mad. 275.

But this proceeding must be in the court having jurisdiction of the estate, and during the time it has such jurisdiction.

In this case, after the death of the plaintiff's husband, her deceased daughter, Ella, lived with her mother, who provided for her in the way parents ordinarily provide for their children. Their relation was simply that of parent and child, and the relation of creditor and debtor did not and could not exist between them. It is claimed that a promise was made by the daughter subsequent to her marriage, to pay her mother for her support. We shall notice the evidence on this hereafter, but even if such were the case, it would not have been a promise to pay a debt which she owed, because she owed none. It would have been a promise without consideration, and therefore invalid.

Upon the marriage of Ella with the defendant, the relations which she had sustained to her mother were entirely

changed. The obligation of her mother for her maintenance, and her obligation to render service to her mother, ceased. Her husband then became liable for her support, and that of her child when it was born. She became emancipated, and under our law could perhaps make contracts, incur obligations, and sue and be sued, in the same manner and with the same effect as if she was of age and sole; so that if upon her marriage, in consideration of her mother's agreement to provide her with food, clothing and lodging, she had promised to pay for these things, and her mother had made such provision in consideration of the promise, it might be that such promise would have been valid and obligatory, and could be enforced against her if alive, or if dead against her legal representatives. But the promise must have been express. The only promise which could be implied was that of her husband. The money to which the plaintiff became entitled by reason of the support which she furnished to Ella and her child was, in the absence of an express agreement, due from the husband and not from the wife.

As we have observed, there is a claim that a promise was made by Ella, some years after she was married, that she would pay her mother for her own maintenance and that of her child for the whole time they lived together before and after her marriage. The only evidence upon this subject is certain conversations she had with different third persons, in which she stated to them that she intended, or expected to, or would, pay her mother for taking care of herself and child. Such statements import no promise, nor are they evidence of any. *Lynn v. Lynn*, 29 Pa. St. 369. But if an actual promise had been made, it would, as to the period before marriage, have been void for want of consideration, and as to the period after marriage, it would have been a promise to pay the debt of another, and not valid unless in writing. But there is no evidence of such promise.

As to what constitutes a mutual and open account current, or as to the effect of the statute of limitations, it is unneces-

sary to express an opinion. No such questions are in the case.

The trial court gave the jury several instructions, the effect of which is, that if Ella E. Perkins had sufficient property for her maintenance and support prior to her marriage in 1880, then the plaintiff was not liable for her support during that period, and was entitled to recover what the same was reasonably worth; and that after her marriage, the liability of plaintiff to support her having ceased, in the absence of any agreement that her support and that of her child should be gratuitous, the plaintiff was entitled to recover what such maintenance was reasonably worth.

There is nothing in the record to warrant these instructions, and there was no evidence which authorized the submission of the case to the jury.

The judgment below must be reversed.

Reversed.

MCDONALD, APPELLANT, v. MCLEOD, APPELLEE.

1. APPELLATE PRACTICE.

An appeal may be dismissed for noncompliance with the rules of court in relation to abstracts and briefs.

2. SAME.

A judgment under review does not rest upon the reasons assigned by the court below. If it is adequately supported by proof, and can be upheld under well settled principles, it is unimportant that inadequate reasons for the finding may have been expressed.

3. PARTNERSHIP.

There may be a copartnership with reference to a single enterprise.

4. PRACTICE.

Where a defendant neglected to go upon the stand and make clear by his own denials his want of connection with a purchase, the court is entirely warranted in concluding even from slight testimony the existence of those facts which would render him liable for the price of that of which he had received the benefit.

Appeal from the District Court of Arapahoe County.

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Mr. J. P. BROCKWAY, for appellant.

Mr. GEO. F. DUNKLEE and Mr. O. E. JACKSON, for appellee.

BISSELL, P. J., delivered the opinion of the court.

This action was brought against the owner of certain property, and the two McDonalds as contractors, to recover a balance due for lumber claimed to have been sold and delivered to the contractors, and used in the erection of the building.

It is with great reluctance that we consider this appeal, and do not dismiss it for failure of the appellant to present it to this court in accordance with the rules. This proceeding in our judgment would be entirely justifiable, since the abstract contains no statement whatever of the pleadings from which the issue is to be derived, and the brief filed is without statement of any errors upon which the appellant relies, or a discussion of any of the assignments upon which he predicates his right to a reversal of the judgment. The brief simply states, that the appellant refers to the opinion of the court below as his best argument for reversal. Manifestly, this is without force as an argument to reverse the cause, since if the judgment is adequately supported by the proof and can be upheld under well settled principles at law, it is unimportant that inadequate reasons may have been expressed for the finding. It not infrequently happens that judgments are affirmed or reversed, and that in *nisi prius* tribunals judgments are entered or refused, and the right conclusions reached in both instances when unsatisfactory reasons are expressed, and counsel have failed to present either authorities or arguments by which the proceedings could be legitimately upheld. But we are so well satisfied that the proper and equitable result was reached in this case, that it will be considered and the judgment affirmed, although the appellant has not so proceeded as to entitle him to call

on the court to express its opinion regarding the merits of his controversy. But we desire it to be distinctly understood by the profession, that this failure to enforce the rules is not to be taken as a precedent on which they can rely in submitting their cases to this court.

The technical defense on which R. P. McDonald, the appellant and one of the defendants, relied to escape liability for the price of the goods sold, is the failure to establish facts on which a joint liability could be predicated, and out of which, if at all, his responsibility would arise. It appeared that in September, 1890, J. R. and R. P. McDonald entered into a contract with W. R. Farrington to build him a house of a certain description and for a definite sum, in one of the subdivisions of Denver. This contract was signed by both of the McDonalds, and the record shows a performance on their part by which they became entitled to the profits and benefits of the contract. While the work was progressing, McLeod, the appellee, sold and delivered a lot of lumber which went into the building. The lumber was not all paid for, and McLeod sued the McDonalds, as stated, to recover the selling price. It was seriously argued by the appellant in the oral argument by which the case was submitted, that a joint liability on the part of the McDonalds could not be legitimately inferred from the production and proof of this joint contract between them and Farrington. This is true, and if that were all that the record contained of evidence upon this subject, the judgment could not stand. It was insisted with equal accuracy that the suit was not brought upon the written contract, under which circumstance the plaintiff might have the right of recovery upon the production of the instrument, since its execution was not denied under oath. These considerations do not dispose of the suit. There is enough in the case to have warranted the court below in holding that the transaction between the McDonalds and Farrington, and between them and McLeod, constituted the McDonalds copartners for the single transaction, to wit: the building of the house. That there may be a copartner-

ship with reference to a single enterprise, as with reference to all of a certain class or kind of business, is as well settled as any other principle of copartnership law. Parsons on Partnership (2 ed.) *52.

It not infrequently happens that what persons do with reference to a single thing, sometimes even without their intention subjects them to all the responsibilities which would flow from a general partnership which would include the particular transaction. The case discloses the making of a contract on the part of the McDonalds to build a house for a certain sum of money, and there is enough in the record from which the court had the right to infer that the contract was entered into for their joint benefit and profit. They jointly contracted, were jointly responsible, jointly reaped the results, and were as to it copartners in the undertaking to build the house. The lumber went into the construction of the building, and it must be assumed in absence of evidence to the contrary, that this lumber was used for the purposes of the contract to which R. P. McDonald was a party, with his knowledge and with his consent. Even though it might have happened, which this court is not inclined to believe, that R. P. McDonald did not authorize J. R. to buy the lumber previous to its purchase, its purchase by J. R., and the delivery by McLeod, and the appropriation by R. P. to the purposes of the joint contract must be held, under the circumstances, to be such a ratification of the purchase as to estop him from denying the agency of J. R. in the premises. It certainly is ample, under the circumstances, as proof of an agency springing from the copartnership with reference to a single undertaking, and with the other proof in the case would probably warrant the court in holding that J. R.'s agency was sufficiently established to warrant a recovery against R. P. McDonald, his principal, even though they were adjudged not to be copartners in the enterprise, which is established by the record. It would have been so exceedingly easy for R. P. McDonald to have gone upon the stand, and made clear by his own denials his want of connection with

the purchase of the lumber, that the trial court was entirely warranted in concluding even from slight testimony the existence of those facts which would render R. P. McDonald liable for the price of the lumber of which he had had the benefit.

The judgment contravenes no well established principle of law, and to our minds is justified by the testimony, and will accordingly be affirmed.

Affirmed.

RIZER, PLAINTIFF IN ERROR, v. MCCARTHY, DEFENDANT
IN ERROR.

1. STATUTE OF FRAUDS.

A sale of chattels, not accompanied by an immediate delivery, and followed by an actual and continued change of possession is fraudulent and void, as against creditors of the vendor.

2. SAME—WHO ARE CREDITORS.

By the statute the term "creditors" includes all persons who are creditors of the vendor or assignor at any time whilst such goods and chattels remain in his possession or control.

3. SAME—SUBSEQUENT SALES.

It is entirely immaterial how many subsequent sales were made or in what manner, so long as the possession of the original vendor remained undisturbed. All such sales are void as to his creditors.

Error to the County Court of Pueblo County.

Mr. JAMES H. MECHEM, for plaintiff in error.

Messrs. DIXON & DIXON, for defendant in error.

THOMPSON, J., delivered the opinion of the court.

In the early part of the year 1891, the Rosenfeld Construction Company, a corporation, being the owner and in possession of the goods and chattels in controversy in this action, sold the same to E. I. Rosenfeld, its president. After-

wards, and in the same year, J. E. Rizer, the plaintiff below, brought an attachment suit against Rosenfeld before a justice of the peace, attached these goods and chattels as the property of Rosenfeld, obtained judgment against him in the suit, and caused the property to be sold under execution issued on the judgment. At the execution sale Rizer became the purchaser.

The sale from the company to Rosenfeld was not followed by any change of possession of the things sold, nor were they delivered to the plaintiff under the purchase made by him, but remained continuously in the possession of the original vendor until they were attached by the Chieftain Publishing Company.

In December, 1891, the Chieftain Publishing Company commenced its action against the Rosenfeld Construction Company, and caused a writ of attachment to be issued therein, and delivered to the defendant, T. G. McCarthy, the sheriff of Pueblo county, who, in pursuance of its commands, levied it upon the goods and chattels mentioned. This is an action in replevin, brought by the plaintiff, Rizer, against the sheriff, T. G. McCarthy as defendant, to recover the possession of the property. That the Chieftain Publishing Company was a *bona fide* creditor of the Rosenfeld Construction Company, is not controverted.

It is earnestly contended that where personal property has been sold under judicial process, it may remain in the possession of the vendor or judgment debtor, and cannot be reached by subsequent creditors of the vendor, and forms an exception to the general rule, which requires that such sale must be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing sold. Numerous authorities are cited by counsel for the respective parties on both sides of this proposition.

We are unable to perceive that any such question is involved in the case. If the suit of the Chieftain Publishing Company had been against E. I. Rosenfeld, and the property had been attached by it while in his possession, then the con-

troverſy would have been between two creditors of the ſame debtor, and it might become important to inquire whether the law warrants the diſtinction contended for, between purchaſers at private ſale and purchaſers under judicial proceſs ; and whether the purchaſe by the plaintiff, Rizer, at execution ſale, became fraudulent and void as againſt the creditors of Roſenfeld, becauſe the property ſold remained in the poſſeſſion of the judgment debtor. But we have no ſuch ſtate of facts before us. Rizer did not permit the property to remain in the poſſeſſion of the judgment debtor. He did not find it there and he did not leave it there. It never had been in Roſenfeld's poſſeſſion, and the Chieftain Publishing Company was not a creditor of Roſenfeld.

The ſale by the Roſenfeld Construction Company to Roſenfeld was, becauſe it was not accompanied by an immediate delivery and followed by an actual and continued change of poſſeſſion, concluſively fraudulent and void as againſt the creditors of the company ; and the ſtatute makes the term "creditors" include all perſons who are creditors of the vendor or aſſignor at any time whiſt ſuch goods and chattels remain in his poſſeſſion or control. 2 Mill's Ann. Stats. 2028.

If there had been no ſale of Roſenfeld's intereſt in the property, and the rights which he acquired by his purchaſe from the Roſenfeld Company had remained unchanged, he would not now be heard to ſay that he was its owner as againſt the claim of the Chieftain Publishing Company. He could aſſert no title to the property as againſt the creditors of his vendor. In what better or different poſition is the plaintiff Rizer ? By his purchaſe he ſtepped into Roſenfeld's ſhoes. He acquired no rights which Roſenfeld did not have. He aſſumed the relations to the creditors of the Roſenfeld Construction Company which had been held by Roſenfeld. As to them he became the repreſentative of Roſenfeld—nothing more and nothing leſs. By ſuffering the property ſtill to remain in the cuſtody of the original vendor, he ſimply continued the ſame courſe in relation to it which was commenced

by Rosenfeld, and if Rosenfeld could not be heard to assert ownership in the property, neither can he.

Our statute of frauds provides that every sale by a vendor of goods in his possession, unless the same be accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing sold, shall be conclusively presumed to be fraudulent and void as against the creditors of the vendor, who shall be such creditors while such goods remain in his possession. The sale from the Rosenfeld Construction Company to Rosenfeld, was *not* accompanied by any delivery or followed by any actual or other change of possession. The Chieftain Publishing Company *was* a creditor while the property remained in the possession of Rosenfeld's vendor; and it is entirely immaterial how many subsequent sales were made, or in what manner, so long as the possession of the original vendor remained undisturbed.

The judgment of the court below is correct, and should be affirmed.

Affirmed.

PEARSE, PLAINTIFF IN ERROR, v. BORDELEAU, DEFENDANT IN ERROR.

1. VENUE.

An action to recover on a money demand growing out of a contract between the parties shall be tried in the county in which the defendants, or any of them, reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county, subject to the power of the court, upon good cause shown, to change the place of trial.

2. VENUE—JURISDICTION.

In such an action, service upon a defendant in a county other than that in which the action is commenced, does not give the court jurisdiction without the acquiescence of the defendant. Where an application, sufficient in form, and uncontradicted, was made for a change of place of trial, the court had jurisdiction of the cause only for the purpose of ordering its removal to the proper county.

3	351
8	102

3	351
11	122
12	243
19	546

8	351
15	347
115	848

8	351
28	882

8	351
17	240
30	129
30	130

3	351
378	92

3. JURISDICTION ON APPEAL.

The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the re-submission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void.

Error to the District Court of San Juan County.

Mr. W. H. GABBERT and Mr. R. D. THOMPSON, for plaintiff in error.

Mr. H. O. MONTAGUE and Mr. GEO. H. BARNES, for defendant in error.

THOMSON, J., delivered the opinion of the court.

There is only one question requiring consideration in this case, and that arises upon the refusal of the court below to change the place of trial on the application of the defendant.

On the 14th day of June, 1890, Joseph Bordeleau commenced his action in the county court of San Juan county, against J. N. Pearse, W. H. Emerson and George Miner, to recover on a money demand growing out of a contract between the parties. As shown by the return of the sheriff, summons was served upon Pearse in San Miguel county. The other defendants were not found. On July 12, 1890, and before answer filed, defendant Pearse made application to the court, supported by his affidavit, to change the place of trial, for the reason that, at the time of the commencement of the action, and at the time of making the application, the defendant, Pearse, was a resident of the county of San Miguel, and the plaintiff a resident of San Juan. What, if any, objection was made to the application does not appear. It seems to be sufficient in form. On the 31st day of August, 1890, the motion was heard by the court and denied; and judgment was afterwards given for the plaintiff. The de-

fendant appealed to the district court of San Juan county. In that court the motion for a change was again heard and again overruled, with leave to defendant to renew his application. A new application was accordingly made, substantially the same as the first, which was met by a counter-motion of plaintiff to retain the action in San Juan county, on the ground that the convenience of witnesses would be promoted by the retention. The court overruled this second application, and rendered judgment against the defendant. The case comes here on error.

Section 27 of the Code provides, that in personal actions such as this, the cause shall be tried in the county in which the defendants or any of them may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; and by the terms of section 28, the court may, on good cause shown, change the place of trial where the county designated in the complaint is not the proper county. Under the provisions of the statute, in a case like this, service upon a defendant in a county other than that in which the action is commenced, does not give the court of the latter county jurisdiction without the acquiescence of the defendant; and when that fact becomes known to the court in the method prescribed by law, it is error to retain the cause and proceed to an adjudication. When, therefore, the application for the change was made in the county court of San Juan county, it being sufficient in form and uncontradicted, that court had jurisdiction of the cause only for the purpose of ordering its removal to the proper county. This precise question has been determined by this court in *Smith v. People*, 2 Colo. Ct. Ap., 99. It is true that in that case, the action was concerning real property, situate in a county different from that in which the cause was commenced, and as to its place of trial was governed by section 25 of the Code; but in so far as the designation of the venue is concerned, the language used in that section, and that used in section 27, are the

same. Both are equally mandatory, and are to be construed alike.

In *Smith v. People, supra*, Reed, J., in delivering the opinion of the court, says: "By the bill of complaint it was shown that the property in controversy was real property, situate in Rio Grande county. On the 25th of April—two days after presenting the complaint—a motion was made to change the venue to that county. If, prior to that time the court had jurisdiction, was it not by such application deprived of all jurisdiction to proceed? By section 25 of the Civil Code, it is declared that such action shall be tried in the county in which the subject of the action, or some part thereof, is situate. It was apparent upon the face of the complaint that it pertained to real property in Rio Grande county, hence, that the district court of Arapahoe county could not retain jurisdiction for adjudication after the motion to change was made." See also, *Wallace et al., v. Owsley*, 27 P. R. 790.

As the county court had lost its jurisdiction, the district court acquired none against the consent of the defendant, for any purpose of adjudication of the merits of the controversy. When the cause came to it by appeal, its duty was to order a change of venue to the county court of San Miguel county, on the re-submission of the original motion filed in the county court. Its authority extended no further. And failing to do that, all of its acts in entertaining and determining motions, and rendering final judgment, are absolutely void.

The judgment of the court below will be reversed, and the cause remanded, with instructions to change the place of trial from the district court of San Juan county to the county court of San Miguel county.

Reversed.

PETTIT, APPELLANT, v. THALHEIMER, APPELLEE.

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7	193
8	355
15	481

1. AGENT, RESPONSIBILITY OF.

An agent, to place a loan, is charged with the duty of a prudent and careful execution of his trust, and is responsible to the loser, if by his negligence the party loaning the money is induced to part with it on the strength of invalid or worthless securities.

2. SAME.

That the agent was imposed upon by another whom he trusted to transact the business in his behalf, affords no defense.

3. INTEREST.

Interest is recoverable only in the cases enumerated in the statute.

4. APPELLATE PRACTICE.

The judgment appealed from may be modified by deducting the interest which was improperly included, and, as modified, affirmed.

Appeal from the District Court of Arapahoe County.

Messrs. C. E. & F. HERRINGTON, and Messrs. RIDDELL, STARKWEATHER & DIXON, for appellant,

Messrs. WOLCOTT & VAILE, and Mr. HENRY F. MAY, for appellee.

BISSELL, P. J., delivered the opinion of the court.

There is so little dispute concerning the facts of this controversy, that there is substantially nothing for the court to do but to determine whether thereon a judgment ought to have been entered for the plaintiff. Of this there can be no question.

The principal discussion tendered by the appellants in support of their contention that the case ought to be reversed, is based upon the testimony contained in the record. What the court assumes to be the facts disclosed by the record will be stated without argument or attempt to justify the results deduced from the evidence of the witnesses. This will be ample to determine the rights of the parties, and a fuller his-

tory of the case would scarcely subserve the useful purpose of a precedent. Early in 1885, A. S. Pettit & Company were dealers in real estate, and brokers who negotiated loans on various kinds of property. A brother of the appellee, Thalheimer, had suggested to Pettit & Company that he could get money from his sister on good ten per cent real estate loans, if one should be offered them. This seems to have been the inception of the dealings between Henry Thalheimer, as the agent of his sister, Mary, and Pettit & Company. In the month of April, 1885, Pettit & Company applied to Thalheimer for a loan on certain real estate in Denver, belonging to Mrs. Electa Mills. In response to this application, Thalheimer called on Pettit & Company, discussed the terms of the loan, and subsequently visited the property that he might exercise his individual judgment concerning the expediency of the loan. He was satisfied with the property, and Pettit & Company furnished him an abstract of the title, which he submitted to a lawyer for examination. The title was satisfactory. It is now important to state the connection of one Joseph Pettit with the transaction. It would appear that he originally called on Pettit & Company concerning the loan to Mrs. Mills, and that it was through his suggestion that Pettit & Company began the transaction. When the loan had been agreed on between Thalheimer and Pettit & Company, the brokers made out the security and the note which was the evidence of debt, and evidently undertook to attend to their execution, either through themselves or Joseph Pettit, with whom they were dealing, and to present them in a completed form to Thalheimer, who would pay over the money when he got these instruments. There is a good deal of controversy in the case as to the relation which Joseph Pettit bore to the respective parties. It is enough to say that whatever may have been his situation, Thalheimer was in no manner connected with him, and in no wise responsible for the part which he played in the transaction. On the 25th of April, 1885, the mortgage and the note, executed apparently by the

borrower, Mrs. Mills, were given to Thalheimer by Pettit & Company, and he gave them a check, payable to their order, for the amount of the loan. They assumed the distribution of the money, and received it for the papers, which they surrendered. This check which was thus delivered to Pettit & Company, payable to their order, was not indorsed by them to the order of the apparent borrower, Mrs. Mills, but at the request of Joseph Pettit, was cashed by them, and they turned over the money to Joseph, less sundry sums in which he was indebted to a third party, Shepard, and to these brokers—by way of commissions, debts, etc. Joseph took the money and left the country, and some months afterwards, when Thalheimer notified Mrs. Mills that the interest was due, she repudiated the entire transaction, pronounced the signatures to the note and mortgage to be forgeries, declined to pay them, and instituted a suit to cancel the security, as a cloud upon her title. In that suit she was successful. The present action evidently waited on the conclusion of that, and then Mary Thalheimer brought it against Pettit & Company to recover the amount of money which she had lost in the transaction, and recovered a judgment for the amount to which she was entitled, and interest on it from Feb. 19, 1887, to the date of judgment.

So far as concerns the main recovery, this judgment is abundantly justified by the record. It cannot be successfully controverted that the case shows in addition to what has already been stated that Pettit & Company acted on behalf of Mary Thalheimer in procuring the apparent execution by Mrs. Mills of the mortgage security and of the note which was the evidence of debt. Whatever their relations may have been originally to Mrs. Mills as negotiators of the loan, they assumed with reference to Mary Thalheimer, under the circumstances of this case, such a relation as compelled them to exercise reasonable care and prudence in the transaction of the business, so far as it related to the making of the instruments. It is undoubtedly clear that where such a relation is assumed, and the party is thereby charged with the duty of

✓ a prudent and careful execution of his trust, he is responsible to the loser, if by his negligence the party loaning the money is induced to part with it on the strength of invalid and worthless securities: *Todd v. Burke*, 27 La. An., 385.

The circumstances of the transaction justified Thalheimer in his reliance upon the brokers in procuring the instruments, and he rightfully assumed that they had exercised due care and caution in seeing that they were signed by the individual to whom the loan was ostensibly made. That Pettit & Company were imposed upon by Joseph Pettit, through whom the business was done, affords them no defense. Undoubtedly that fact shows that their connection with the transaction was entirely free from suspicion and the stain of dishonesty, and that they were imposed upon by the man whom they trusted to transact the business on their behalf; but since he was their agent, and Thalheimer cannot be charged with his conduct or neglect, it is their misfortune that they must respond to the damages which Mary Thalheimer sustained.

In entering the judgment, the court permitted the recovery of interest on the money paid at the rate of eight per cent from the 19th of February, 1887, to the date of the recovery. This part of the judgment cannot be sustained. Ever since the case of *D. S. P. & P. R. R. Co. v. Conway*, 8 Colo. 1, it has been settled that interest can only be recovered in this state in the cases enumerated in the statute. Wherever the plaintiff's right of action must take the form of a judgment for damages resulting from the wrong or negligence of a defendant, interest may not be included in a verdict, unless the case be brought within the principle laid down in the *Omaha and Grant Smelting and Refining Co. v. Tabor*, 13 Colo. 41. Since this is true, it is evident that there is nothing in the statutes regulating the matter of interest in this state which warrants the recovery of interest by the plaintiff.

There are no other errors of sufficient gravity to require a discussion, or which, if sustained, would require a reversal of the case.

The judgment will be modified by the deduction of the interest which was included in the judgment, and as thus modified the judgment will be affirmed.

Affirmed.

MAU, PLAINTIFF IN ERROR, v. MORSE, ET AL., DEFENDANTS IN ERROR.

1. NEGLIGENCE—PRACTICE.

The question of negligence is a mixed one of law and fact. Where the facts are disputed or of doubtful character, the question must be submitted to the jury under instructions; but where there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, it is purely one of law.

2. SAME.

Where the facts show negligence on part of the plaintiff contributing to the accident, the case may be withdrawn from the jury.

3. SAME.

If the complaint on its face shows clearly, defined and palpable negligence on the part of the person injured contributing to the injury, no cause of action is stated, and it is proper to demur.

Error to the District Court of Arapahoe County.

Mr. R. D. THOMPSON, for plaintiff in error.

Messrs. TELLER, ORAHOD & MORGAN, for defendants in error.

THOMSON, J., delivered the opinion of the court.

The plaintiff brought her action in the court below to recover damages for the death of her husband, who was struck and killed by an elevator in the possession of and operated by the defendants. The only question presented for our determination relates to the sufficiency of the complaint. The

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4	572
4	577
3	359
8	398
8	859
14	511
3	359
20	357
3	359
3368	17

cause of action is stated as follows : " That at the dates hereinafter set forth the building hereinafter mentioned and referred to as the Boston Building, located on the south corner of Champa and Seventeenth streets, in Denver, Colo., was in the possession of the defendants, and the elevators in said building were being operated by the said defendants, for the use of the contractors, sub-contractors, occupants, and persons visiting or having business with the occupants of the said building.

" That this plaintiff is the widow of Feodore Mau, deceased, hereinafter mentioned ; and that she and the said Feodore Mau were married in Denver, Colo., on, to wit, the 16th day of December, A. D. 1890.

" That on the 19th day of December, A. D. 1890, the said Feodore Mau was in the employ of Fritz Thies, wholesale liquor dealer of Denver, Colo., and in the course of his employment was sent to the said Boston Building to the office of the United States Internal Revenue located therein, on a matter of business with the officers of the said United States revenue then doing business in the said building.

" That on the day last aforesaid one of the elevators in the said building was in operation carrying as passengers, to and from the different floors thereof, occupants of the said building, and persons having business with them (the stairway in said building being still unfinished and unfit for use.)

" That the said building is constructed and arranged for general business purposes, and contains a large number of business offices.

" That the said Feodore Mau, deceased, was taken by the said elevator to the third floor of the said building on which said office of the United States Internal Revenue was located, and, after completing his said business he was sent there to transact, returned to the said elevator to be reconveyed to the ground floor. That at that time said elevator was in full operation, but that the door at which the said Feodore Mau was to enter from the hall into such elevator was unfinished

and incomplete; that is to say, the door was without any screen above the crossbar or centerpiece thereof.

“That it is the general custom in Denver and other cities to make the doors leading to passenger elevators of a substantial frame with crossbar or centerpiece, and to fill in the open space above such crossbar and centerpiece with a screen of iron, brass or other metallic bars or nettings, to keep passengers from being struck by the elevators as they pass up and down the shafts.

“That the elevator in the said building by which the said Feodore Mau was killed is a passenger elevator, and moves very rapidly with scarcely a perceptible noise, so that, in effect, no warning is given of its approach; and that said elevator, as it moves in its shaft, approaches very close to the door leading to it, so that the persons using the building were exposed to great danger from said elevator.

“That no notice was placed at the said elevator warning persons of the danger from said elevator.

“That the said Feodore Mau was never in said building, as plaintiff is informed and believes, except on the said occasion of the said 19th day of December, A. D. 1890, when he was killed as herein alleged.

“That on the said 19th day of December, A. D. 1890, while in said building aforesaid, and waiting for said elevator on said third floor, for the purpose of being conveyed to the ground floor, said Feodore Mau, while looking down the shaft of the said elevator, through the said opening in the said door, was killed by the said elevator coming down the shaft noiselessly and without warning, striking him on the head and crushing him between the bottom of the elevator-car and the middle crossbar or centerpiece of the said unfinished door.

“That the person in charge of the said elevator for the defendants was supplied with a whistle to be used while going up and down the elevator shaft to warn everybody of the approach of the elevator, but that such whistle was not blown as the elevator approached and killed the said Feodore Mau, and that the said Feodore Mau, deceased, had no means of

locating the said elevator-car in the absence of such whistling, except by looking into the said shaft for it.

“That the said Feodore Mau was unacquainted with the operation and use of passenger elevators, and unadvised of the danger in which he placed himself by looking down the said elevator shaft at the time he was killed, as herein alleged.

“That by the wrongful neglect of the defendants to screen and complete said door, and that by the wrongful neglect of the defendants to notify the said Feodore Mau of the danger, he was not advised of the risk he incurred in looking down said shaft, and by the neglect of the defendants to give any signal of the approach of the said elevator-car at the time he was killed, he was not warned of the danger to which he was exposed, and that by their said wrongful neglect the defendants caused the death of the said Feodore Mau.”

A demurrer for the want of facts to entitle the plaintiff to a recovery was sustained, and the plaintiff having declined to amend, judgment was accordingly given against her. She brings the case here by writ of error. The objection made to the complaint is, that it shows upon its face that the death of the deceased was the result of his own negligence.

The question of negligence is a mixed one of law and fact. Where the facts are disputed, or of doubtful character, the question must be submitted to the jury under the instructions of the court; but where there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence will pursue under the circumstances, the question of negligence is purely one of law. *Fernandez v. Sacramento City R. Co.*, 52 Cal. 45.

And where the facts show negligence on the part of the plaintiff contributing to the accident, the judge may withdraw the case from the jury. *D. & R. G. R. Co. v. Ryan*, 17 Colo. 103; *Flemming v. W. P. R. Co.*, 49 Cal. 253; *Donaldson v. M. & St. P. R. Co.*, 21 Minn. 293; *Brown, Adm'x v. M. & St. P. R. Co.*, 22 Minn. 165.

In such case it is immaterial whether the question of law arises out of the evidence introduced at the trial, or out of

the complaint itself. If the complaint on its face shows clearly-defined and palpable negligence on the part of the person injured contributing to the injury ; or in other words, if the complaint, together with the cause of action, sets forth the facts which defeat the action, then, taking the whole complaint together, there is no cause of action stated, and it is proper to demur.

It appears from this complaint that the deceased, on the day of the accident, rode in the elevator to the third floor of the building, and having transacted his business, returned to the elevator to be reconveyed to the starting point. Now as to whether he had ever been in that building before, or as to whether he was acquainted or unacquainted with the operation of passenger elevators, is, in view of the facts disclosed by the complaint, a matter of no consequence. He had used the elevator and knew what its purpose was. He had ridden up in it. He knew that it would descend again, because he was waiting for its descent, in order that he might return in it. He knew that the shaft was for the passage up and down within it of the elevator, and he must have known that it was for no other purpose. He knew the exposed and unprotected condition of the opening to the elevator, because he had just passed through it in leaving, and was waiting to pass through it again in returning. He had the best means of knowledge that he possibly could have of the noiseless and rapid character of its motion, namely, personal observation. There was not an element of danger connected with the elevator or the shaft, that was not distinctly visible ; there was nothing about either that could be made a source of danger to him without his own active co-operation ; and he is presumed to have had sufficient knowledge of the relation of cause and effect, to understand that if his head was within the shaft when the elevator passed by in its descent, serious, if not fatal, injury was inevitable. What the purpose of the whistle was is not explicitly stated, but it is a fair inference from the complaint that it was to notify passengers of the approach of the elevator, so that they might be ready to board

it when it reached their floor. It surely was not to warn persons who were transacting business in the building, not to thrust their heads into the elevator shaft. The defendants could not be expected to assume that men in possession of their faculties would be engaged in acts so palpably negligent.

It seems quite clear to us that the allegations in the complaint do not warrant any recovery in this case, but in view of the earnestness and evident sincerity with which plaintiff's counsel contended for his position, we have given the authorities submitted by him a close and careful examination; and in the course of such examination have found no new principle announced. There is not in any of them an attempt at departure from the old and established doctrines on the subject of negligence. Unless the injury suffered was recklessly or intentionally inflicted, then it must appear that it was occasioned by the defendants' negligence, without contributory negligence on the part of the deceased; and counsel has cited us to nothing in contravention of this proposition. It would serve no useful purpose to enter into an extended review of the authorities to which we have been referred, but we will notice a few of them briefly in confirmation of what we have said. Cooley in his work on Torts, at page 550, says: "Whether invited upon his premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation." In 1st Thompson on Negligence, commencing at page 283, an English case, the final decision of which was reached in the exchequer chamber is set forth in full. The doctrine of that case is stated by Kelly, C. B., in quoting with approval the following in the judgment of the court below. "With respect to such a visitor, at least, we consider it settled law, that he using reasonable care on his part for his own safety, is entitled to expect that the occu-

pier shall on his part use reasonable care to prevent damage, or unusual danger which he knows or ought to know." The cases of *Schumacher v. St. L. & S. F. R. Co.*, 29 Fed. Rep. 174, and *Eskridge, Ex'r v. C. N. & O. & T. P. R. Co.*, 12 S. W. R., 580, turn upon the question of willful negligence. In the latter case, willful negligence is defined to be "conduct such as to evidence reckless indifference as to the safety of the public, or an intentional failure to perform a plain and manifest duty, in the performance of which the public and the party injured had an interest;" and in the former the principle is stated thus: "The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. An act may be legally willful without a direct intent. It may be so willful if reckless." We find nothing in these authorities in any manner applicable to the facts of the case before us. The deceased had a tacit invitation to enter the building for the transaction of his business, and had a right to use the elevator to be conveyed to the floor he desired to reach and to return therefrom. He had a right to assume that the elevator was in good order and condition, and would convey him safely, and that the means of ingress and egress could be used without danger; but outside of the elevator he had no right to use the shaft for any purpose; he had no right to be within, or to have any part of his person within the shaft except as he was at the same time within the elevator. As long as he was using the building and its appliances for the purposes for which he was invited to use them, and for which he had a right to use them, he was in no danger; it was only when he undertook to use them in a manner outside of any invitation and any right which he had, that the disaster occurred. If the employee of defendants in charge of the elevator had, while descending, observed the position of the deceased, and had neglected to warn him, or had neglected to stop the elevator if he had time to do so, and had nevertheless suffered the elevator to proceed until it came in contact with the deceased, that would have been evidence of

willful negligence, and a wanton disregard of life, against which the careless act of the deceased would not avail the defendants; but the complaint shows no negligence of that kind. The negligence complained of is the failure to properly protect the entrance to the elevator, which when the elevator was not present, was also an entrance to the shaft. It is true that if the opening had been so protected, the deceased would probably have been unable to thrust his head into the shaft, but we are not sure that he could not have found some other means of equally unnecessary danger; and as to him, with the knowledge of the situation which he possessed, or ought to have possessed, the failure of the defendants in that regard can hardly be said to be negligence.

It is possible that while the opening was in the exposed condition described in the complaint, a case might have arisen in which the defendants would be held liable for a resulting injury, but such a case would differ widely in all its distinctive features from the one before us. If a man in his sound senses, with his eyes open, voluntarily and deliberately, even if carelessly, thrust himself into the jaws of death, we know of no theory upon which anyone can be held responsible for the consequences of his act but himself.

The demurrer was rightly sustained, and the judgment below was correct and will be affirmed.

Affirmed.

EATON ET AL., APPELLANTS, V. THE LARIMER AND WELD
RESERVOIR COMPANY, APPELLEE.

1. MEASURE OF DAMAGES.

Damages recoverable by a corporation in an action on an injunction bond are ordinarily limited to losses and injuries sustained by it by reason of the wrongful suing out of the writ.

2. SAME.

A corporation suing on an injunction bond running to it, cannot include in its claim for damages those which have incidentally fallen on its

stockholders, without proof that it has been compelled to respond for a breach of some valid contract into which it had antecedently entered, and which it was prevented from performing by the bond in suit, or a showing that it has rightfully liquidated the claims asserted against it.

8. APPELLATE PRACTICE.

When part of the recovery is erroneous and it cannot be definitely ascertained what part could be legitimately sustained, the judgment cannot be modified and permitted to stand, but must be reversed.

Appeal from the District Court of Weld County.

Mr. JAMES W. MCCREERY, for appellants.

Mr. H. N. HAYNES, for appellee.

BISSELL, P. J., delivered the opinion of the court.

This action was brought to recover damages for the alleged breach of the conditions of a bond executed by the appellants under the terms of an order authorizing a writ of injunction to issue in a suit brought by Eaton and others against the Larimer and Weld Reservoir Company.

At the time of the inception of this controversy, The Larimer and Weld Canal Company owned and was operating a ditch for the distribution of water to the holders of water rights in a canal running through the counties of Larimer and Weld for a distance of some fifty miles. The Eatons were the owners of divers water rights in that ditch. Sometime in the year 1890, a corporation was organized under the statute to construct some reservoirs for the detention of water to be subsequently distributed. It does not appear from the record whether all of the stockholders in that new company were the owners of lands along the line of The Larimer and Weld Canal, or whether part of them were so situated, and the balance simply stockholders for profit. However this may be, The Larimer and Weld Reservoir Company having been organized, constructed one or more reservoirs according to the purposes of their organization. One of them was

called the Terry Lake Reservoir, from which in 1891, the Reservoir Company started the construction of an outlet ditch to connect the lake with the Larimer and Weld Ditch, through which the stored water was to be distributed to such of the stockholders as owned lands along the line of the Larimer and Weld Ditch below the outlet. Before completing the outlet and turning the water in, the Reservoir Company started proceedings in the county court of Weld county to condemn the Larimer and Weld Ditch to the extent of permitting the Reservoir Company to distribute through its channel the stored waters in their lakes to the reservoir stockholders who were entitled thereto under their contracts with the Reservoir Company. The regularity, legality and sufficiency of those proceedings in condemnation are not involved in the present suit. It is enough to say that thereunder such proceedings were had as culminated in an order of the court permitting the Reservoir Company to take possession of the Larimer and Weld Ditch for the purposes described in their petition of condemnation on the deposit in court for the benefit of the Ditch Company of a specified sum of money. Thereupon the outlet into the ditch was cut, the reservoir waters turned into the canal, and the managers and directors of the Reservoir Company attempted to make their distribution a successful one to their stockholders by so regulating the head-gates of the laterals leading from the Larimer and Weld Ditch and belonging to the holders of water rights in this ditch other than stockholders in the reservoir company, that the waters distributed in this way should be available and beneficial only to these latter stockholders. This naturally led to a controversy, and it would appear that the persons in charge of the reservoir interests attempted to protect their rights by a show at least of force, and it led to the bringing of a suit by Eaton, one of the appellants, and others, in the district court, to restrain the managers and directors of the Reservoir Company from in any wise interfering with the Larimer and Weld Ditch or using it for the purposes to which that company were endeavoring to acquire a right by

the condemnation proceedings. The writ was ordered to issue on the filing of a bond with a specified penalty and in the usual terms. The bond was filed and contained this condition: "In case said injunction shall issue, the said plaintiffs will pay to the defendants all costs and damage which shall be awarded against the complainant in case the said injunction shall be modified or dissolved in whole or in part."

Thereafter the Reservoir Company, which was the defendant in that suit, moved to dissolve the writ, and when the matter came on for hearing before one of the judges in the district court in Denver, the injunction was dissolved, and it was ordered by the judge that the action be dismissed without prejudice. So far as the present record discloses, that order was entered without objection, remains in full force and unmodified, and no steps have been taken to reverse it. This order was entered on the 15th of August 1891, and on the 24th of October of the same year this suit was brought against the signers of the bond, Benjamin H. and Aaron S. Eaton. The complaint was in the ordinary form—alleged the corporate capacity of the plaintiffs, the bringing of the injunction suit, the issuance of the writ, the giving of the bond, the dissolution, and stated the damages sustained, and prayed judgment.

The appellants discuss but two of the assigned errors in their brief; the one relates to the time of the bringing of the suit, and the other to the rule laid down by the trial court for the assessment of damages. We do not perceive that the first contention is properly presented for our consideration. Whether therefore an action can be brought upon an injunction bond containing the expressed condition of the one in suit, and can be successfully maintained prior to a final determination of the original action will be left unnoticed farther than to say, that according to the present record that case was dismissed by the order of the judge who dissolved the injunction, and the appellants in no manner during the trial of the present cause preserved the question relating to the right of the company to bring suit when they did. The

other question is not so readily disposed of, since it is fairly presented to the court for determination. During the progress of the trial, proof was offered which tended to show that the stockholders of the Reservoir Company had suffered large loss in the destruction and diminution of their crops for the want of water which they were unable to obtain because of the issuance of the writ against the Reservoir Company. While the objection to the testimony was very general, yet the court was directly requested to instruct the jury that the Reservoir Company could "recover no damages on account of any that may have been sustained by the individual stockholders." This the court refused to do, but it generally instructed the jury that they were entitled to take into consideration any damages sustained by the plaintiff and done to the crops because of the loss and non-receipt of the water. It is true that the instruction given in general terms charged the jury that it was the Company which was entitled to recover the damages resulting from the loss of crops, but that does not of itself remedy the difficulty or remove the error which the court committed in refusing to give the charge which the defendants requested.

Without attempting by the processes of inclusion and exclusion to give an absolutely accurate definition of a corporation, it may be termed an artificial person created by law, with many of the powers and responsibilities of the natural person, and with many which are peculiar to its own artificial existence. For the purpose of enforcing its obligations, determining its responsibilities, subjecting it to compulsory performance of its contracts, or requiring it to respond in damages for torts which have been committed in its name and by its authority, the law regards it as an entity wholly distinct and separate from its directory or its stockholders. The converse is equally true. Ordinarily it, and it only, may bring suit to enforce agreements to which it is a party, and ask judgment for damages which it has sustained by reason of the wrongs done to it and its property. These well settled principles demonstrate the inaccuracy of the rule laid down

by the court by which the jury should measure the damages resulting from the operation of the writ. The suit was brought by the complainants against the Reservoir Company alone. The writ was against it. The bond to support it was a promise to respond to the corporation for whatever damages that artificial being should sustain. By no process of reasoning can the bond be made to include a covenant to protect the stockholders of the corporation from any loss which should fall on them because of the failure of the company to discharge its contracts, unless it should be determined in some legal way that the Reservoir Company was responsible to the contracting parties for the failure to deliver water under some valid undertaking into which it had entered. No such question is presented. The record only raises the naked inquiry whether, when a corporation sues on a bond running to it, it can include in its claim for damages those which have incidentally fallen on its stockholders, without proof that they have been compelled to respond for a breach of some valid contract into which they had antecedently entered, and which they were prevented from performing by the bond in suit, or a showing that they have rightfully liquidated the claims asserted against it. The statement of the query furnishes its own refutation. The corporation was not farming the lands on which the crops were sown that suffered from the failure to deliver the water. They were the property of third persons who were not parties to the action in which the writ issued, and who were not nominated in the bond on which the suit is based. To extend the right to recover to include these losses under such circumstances would surely violate the well founded doctrine that nothing shall be allowed which is not the actual, natural and proximate result of the wrong committed. High on Injunctions, § 1663.

The judgment cannot be modified and permitted to stand. The proofs on the matter of counsel fees and expenses are not so definite as to enable the court to decide what part of the recovery could be legitimately sustained.

For the error committed by the court in instructing the jury on the measure of damages the case must be reversed and remanded.

Reversed.

HUNTER, APPELLANT, v. DICKINSON ET AL., APPELLEES.

1. COURTS.

Courts are organized for the purpose of deciding and determining actual disputes and legitimate legal controversies between parties.

2. DEAD ISSUES, NOT DECIDED.

Where the disputes between parties have been settled pending appeal, the court will decline to determine any of the questions upon the record, and will dismiss the appeal.

Appeal from the District Court of Arapahoe County.

Mr. FREDERICK A. WILLIAMS, for appellant.

Mr. G. G. SYMES, for appellee.

BISSELL, P. J., delivered the opinion of the court.

In 1892, Hayden, Dickinson and Feldhauser were the owners of a piece of realty situate on the corner of California and Sixteenth streets in the city of Denver. They were erecting a large business block on the property, and their plans contemplated that the water connections should be made on Sixteenth street, on a line which should be substantially that of the alley north of their building extended through Sixteenth street. At that time Sixteenth street had been paved with asphalt—while California remained uncovered with a pavement. There were two lines of water mains running along each street, one controlled by the American Water Company, and the other by what is known as the Citizens' Water Company. It seems to have been the inten-

tion of the owners to connect with the Citizens' Company's water mains in Sixteenth street. An application was made to Hunter, who was the city engineer, for a permit to dig the trenches and make the connection. This was refused. Thereupon a proceeding by mandamus was started to compel him to discharge what was claimed to be his duty in respect of this matter. He raised an issue by his answer, which was predicated substantially upon sundry ordinances of the common council which undertook to define the classes of persons that might receive permits, and also inhibited the digging up of any paved streets for a specified period. The proceedings resulted in a judgment awarding the writ against the engineer, and the present appeal is prosecuted from that judgment. No other facts need be stated to understand the nature of the controversy which is sought to be prosecuted to a final determination in this court. It will not be decided. On the hearing in response to questions by the court, it was admitted by counsel that sometime after the appeal was perfected, and probably within four or five months after the proceeding was begun, the dispute had been settled by the parties, a permit issued, and all desired connections made and the building used and occupied. It is probably just to counsel to say that the inquiry was put by the writer of the opinion by reason of his personal knowledge concerning the situation, and that it was put because it was evident that there was no substantial case pending which litigants had a right to call on this court to determine. Further consideration of the matter has confirmed the writer and the other members of the court in the opinion that this is not a case which this court ought to decide. Courts are organized for the purposes of deciding and determining actual disputes and legitimate legal controversies existing between parties. It is true, that under the statute, parties may make an agreed case and call on the courts to pronounce their opinions concerning it, but even in such matters it is a *sine qua non* that the parties shall attach to their agreed case proof by affidavit that it represents an existing, pending, living dispute. It is not permitted to litigants to commence

actions, take appeals, settle their controversies and then call upon the court to declare general principles, construe ordinances, and determine rights which can only be of value to perhaps other pending or future litigation. This court declines to consider or determine this case, and directs the appeal to be dismissed, and the costs thereof be equally borne and divided between the parties.

The appeal is dismissed.

Dismissed.

FISK, PLAINTIFF IN ERROR, v. CATHCART ET AL., DEFENDANT IN ERROR.

1. COVENANTS.

A covenant against incumbrances is one *in præsenti*, and is broken at the time of the execution of the deed, if there be an outstanding valid lien which the grantee is compelled to discharge.

2. SAME.

When an estate is conveyed subject to an incumbrance, the grantee takes an estate which draws to itself the right to enforce all covenants contained in the deed whereby it was transferred, or any other covenants contained in antecedent conveyances which run with the land.

3. SAME.

Where a conveyance is made subject to an incumbrance but contains, with this exception, general covenants against incumbrances, and the estate passed is subsequently extinguished by proceedings under the excepted incumbrance, a remote grantee cannot, after extinguishment of his estate, maintain an action upon a breach of the covenant against incumbrances, notwithstanding he was compelled to expend money to remove a lien upon the premises while he held them.

Error to the District Court of Arapahoe County.

Messrs. ROGERS, SHAFROTH & WALLING, for plaintiff in error.

Mr. JOHN P. BROCKWAY, for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

This action is based upon a covenant contained in a deed under which Fisk, the plaintiff in error, claims to have acquired the title to certain real property situate in the city of Denver.

In 1883, Edgar D. Parker owned lands, and on the 10th day of January of that year executed his deed of trust to John Sidney Brown, as trustee, to secure the payment of thirteen thousand (\$13,000) dollars to Elizabeth S. Iliff, within three years of the date of the loan. The importance of these facts in determining Fisk's right to maintain the action of covenant which he brought, will become apparent when the subsequent title is deraigned. After Parker made this deed, he sold his equity to Cathcart and Reser, and on the 5th of March, 1883, executed to them a deed which contained the general covenants of seizin, against incumbrances, of quiet enjoyment and general warranty. The last grantees deeded to Montgomery, who transferred to Reser, from whom the title passed to Lina Beecher, and from him to Fisk. The last deed from Beecher to Fisk was dated June 3, 1885. All these deeds contained the same covenants which were expressed in the original transfer from Parker to Cathcart and Reser. While the title stood in Cathcart and Reser, it became subject to the taxes of 1884, which were not paid, and in May, 1885, the property was sold by the treasurer of Arapahoe county. This incumbrance or lien for taxes accrued during the time that the last named grantors held the title, but the sale was made during the time that the title stood in Beecher, and prior to the conveyance to Fisk. This is stated more for the purposes of illustrating the contention of the appellants than because of its exact bearing upon the legal proposition involved. All of these deeds which have been mentioned, except the one from Parker to John Sidney Brown, which was a trust deed, were made subject to that incumbrance and to all of its terms and provisions. One of the conditions of the trust deed obligated the grantor to pay the

taxes which might be levied against the property, authorized the trustee to apply the proceeds of any sale that might be had under it to the liquidation of the general incumbrance, and of any liens that might be legitimately tacked on to it, under its stipulations.

In December, 1885, Parker and his subsequent grantees defaulted in the conditions of the deed of trust, and the trustee proceeded to foreclose it. The regularity of his proceedings are not questioned, and they culminated in a deed from him to Elizabeth Warren. The title thus vested in Mrs. Warren passed by mesne conveyances to one Brummagen, and from him to Fisk by a deed which was dated the 5th of April, 1887. About a month afterwards, Fisk redeemed the premises from the tax sale, and expended in doing it \$595.22, for which he brings this suit against Cathcart and Reser on their covenant of warranty contained, as heretofore stated, in their deed to Montgomery, of June 14, 1884. Fisk did not recover.

The view which the court takes of the situation of the title removes the necessity to discuss many intricate and difficult questions on which learned authors and eminent judges have bestowed much labor. In reality the action assumes the form of what, under the ancient practice, would be a suit on the covenant against incumbrances brought by a subsequent grantee who had sustained damage for the amount which he was compelled to pay to relieve the property of the incumbrance. All agree that the covenant against incumbrances is one *in præsenti* and broken at the time of the execution of the deed, if then there be outstanding a valid lien which the grantee is compelled to discharge. The authorities are not absolutely uniform as to the measure of damages in a case of this description, nor entirely harmonious on the inquiry whether if a more remote grantee be compelled to discharge the lien he may not recover therefor, notwithstanding nominal damages may have been antecedently recovered by his or some prior grantor, who is entitled to maintain the suit because the breach happened at the time he took title. It is

needless to do more than intimate these rules. It was well settled, and probably remains so, that when an estate is conveyed subject to incumbrance, what the grantee takes, which is ordinarily termed an equity of redemption, is in reality and in legal substance an estate which draws to itself the right to enforce all covenants contained in the deed whereby it was transferred, or any other covenants contained in antecedent conveyances which run with the land, and to which by virtue of the transfer the grantee succeeds in right. And it has been held that this succession to the right to enforce the covenants which run with the land, would go to a subsequent holder of a title, even though it might have come to him by operation of law, as in the case of sales under legal process properly running against the transferred equity. Rawle on Covenants for Title (4th ed.), pages 262, 284, 290, 334, *et seq.* *White v. Whitney*, 3 Metc. 81; *Moore v. Merrill*, 17 N. H. 75; *Thayer v. Clemence*, 22 Pick. 490; *Richard v. Bent*, 59 Ill. 38.

But none of these principles seem to be applicable or determinative of the present controversy. What passed by the deeds from Parker to his subsequent grantees, which is recognized by all the authorities as an estate, but is for the purposes of this decision more aptly called an equity of redemption, undoubtedly determined and ceased to have a legal or equitable existence upon the completion of the sale under the trust deed when the title was transferred to Mrs. Warren. The original fee was in Parker, and the subsequent estate which he granted was undoubtedly limited and controlled by the terms of the transfer to Brown, and liable to be defeated by the complete conveyance of the title, which the trustee was authorized to make in case Parker or any subsequent grantees should default in the performance of the conditions and limitations contained in that deed. It will be remembered that all the later deeds from Cathcart and Reser to Fisk were subject to that incumbrance and to the limitations of the deed to Brown, and all that the parties can be said to have taken was an estate which would be defeasible upon the

nonperformance of the conditions contained in the trust deed, and the execution of its provisions by the trustee named in it. It therefore becomes plain that when the trustee exercised his functions, sold the property, and deeded it to Mrs. Warren, she took the original fee, which was in her relieved of any subsequently accruing burdens; and the equity of redemption which had passed to his grantees vested in her, not by the operation of those conveyances, but by the exercise of the trust powers contained in the original instrument of trust, and the whole estate became vested in her. This resulted in extinguishing the equity of redemption, and is undoubtedly the exact legal equivalent of the foreclosure of a mortgage, whereby the equities of subsequent grantees are foreclosed and their rights thereby lost. It is doubtless true that this title became vested in Fisk, but because he became the subsequent owner of the property it did not revive in him the right to enforce conveyances which only ran with a title which was as to him entirely destroyed by the foreclosure of the trust deed from which his subsequent title springs. Under these circumstances, there is no privity between him as a grantee from Beecher, and the prior grantors subsequent to Parker, which entitles him to maintain his suit upon his covenant.

The conditions and limitations contained in the trust deed are equally conclusive upon his rights. Parker was obligated by the terms of his grant to satisfy liens of this description, and he authorized the trustee, Brown, to apply the proceeds of the sale in liquidation of the claims. The interest in the title which Fisk acquired through the deeds from Brown to Mrs. Warren, and from her to Brummagen and thence to him, was so far as the record discloses unprotected by any antecedent covenants which he had the right to enforce, and his only remedy, if any, would be to compel the proper application of the proceeds of the sale to the liquidation of whatever legitimate claims there might be on the fund, and to resort to Parker, if he had the legal right by the terms of the instrument, and compel him to perform his undertaking with respect to

these taxes. Evidently he is without right to maintain the action of covenant against these remote grantors to compel the liquidation of this lien.

The judgment of the court below accords with the law as herein declared, and it will accordingly be affirmed.

Affirmed.

HAMMOND, PLAINTIFF IN ERROR, v. HERDMAN, DEFENDANT IN ERROR.

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128 166

1. APPELLATE PRACTICE.

When the record is not prepared in conformity with the rules of court, the writ of error will be dismissed.

2. SAME.

Assignments of error based upon the giving of certain instructions will not be considered when all the instructions are not preserved in the record.

3. SAME.

Where there are no pleadings, and the evidence on which the case was tried is not preserved, the court's charge to the jury will not be reviewed.

Error to the County Court of Otero County.

Mr. PLATT WICKS and Mr. A. F. THOMPSON, for plaintiff in error. v

Mr. JAMES HOFFMIRE, for defendant in error.

PER CURIAM. This case was originally brought before a justice of the peace in Otero county to recover the value of a portion of a crop which was sold to the plaintiff in error by one Hansbrough. From the judgment which was rendered by the justice, an appeal was taken to the county court, and Herdman there got judgment against Hammond for \$38.98, and the case was brought here by writ of error.

The writ of error must be dismissed without an adjudication of the questions discussed by the plaintiff in error, for the want of a record which is in conformity with the rules, or sufficient to enable the court to pass on them. There is no bill of exceptions, and the evidence introduced on the hearing is not before the court, and since the case originated before a justice, the issues are not preserved by pleadings. Under these circumstances, the court is unable to determine just what the controversy was, or what case the parties attempted to present. The abstract contains nothing but the instructions of the court. The error is laid on these instructions, and it is insisted that the cause must be reversed, because the court failed to state the law correctly. There are many reasons why this contention is not well founded. In the first place, the record does not necessarily show that all the instructions are contained in what is certified to this court. It has been repeatedly decided by the supreme court that a case will not be reversed because of alleged error in respect of these matters, unless all the instructions are preserved in the record. *Dawson v. Coston*, 18 Colo. 493.

It is equally manifest that where there are no pleadings, and none of the evidence is preserved on which the case was tried, it is impossible to determine the sufficiency, the accuracy, or the impropriety of the court's charge to the jury.

The record is not presented in such form as to entitle the parties to a discussion or a determination of the questions which they argue, and the writ of error must be dismissed.

Dismissed.

THE ARKANSAS RIVER, LAND, RESERVOIR AND CANAL
COMPANY, PLAINTIFF IN ERROR, v. FLINN, DEFENDANT
IN ERROR.

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4	440
3	381
d10	204
8	381
16	346

1. STATUTORY CONSTRUCTION.

Lien statutes being in derogation of the common law are to be strictly construed.

2. FORECLOSURE OF MECHANIC'S LIEN—PLEADING.

To entitle a plaintiff to maintain a suit to foreclose a mechanic's lien he must, in his complaint, allege everything essential to the existence and establishment of his claim, and by allegations—both specific and general—bring himself literally within the terms of the statute.

3. NOTICE OF LIEN, WHERE FILED.

A party who claims a mechanic's lien is required to file his notice in the county where situate. And, where the property on which the lien is claimed extends into or through several counties, the notice must be filed in each county.

Error to the District Court of Bent County.

Messrs. SHERIDAN & SHORT, for plaintiff in error.

Mr. A. M. LAMBRIGHT, Mr. O. G. HESS, and Mr. B. L. CARR, for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

This judgment was taken by default, and the record brought up by the writ contains none of the evidence whereon the decree was entered. From the complaint and the recitals of the decree, it would appear that, during the summer of 1890, Sydney Flinn did work and labor for the Arkansas Land and Canal Company on the canal property proper, and upon certain lands of which it is charged the corporation was the lessee and in possession. The value of the work was about \$400. The suit was brought to recover this sum, and evidently to enforce what the plaintiff claimed was a lien against this property. After default a decree was entered

which gave judgment to Flinn against the company for the sum claimed, and also declared and established his lien on the canal, and directed its sale. The case is brought up on error, and the judgment is assailed on many grounds—some of which are well taken. The opinion will not be prolonged to the extent which would be requisite to the setting out of the complaint or of the entire decree—enough only will be stated to show that the errors are well laid, and that the judgment cannot be permitted to stand.

In reality the complaint is in substance nothing more than a statement of a cause of action for money due for work done. In that particular, if the judgment had been simply against the company for so much money, it would have been unassailable. Nothing is better settled in the law than that the lien statutes are in derogation of the common law—creatures purely of the legislative will, and to be strictly construed wherever parties attempt to assert rights under them. In order to entitle a plaintiff to maintain a suit in the nature of a bill in equity to foreclose his lien, he must in his complaint allege everything essential to the existence and establishment of his claim, and by allegations—both specific and general—bring himself literally within the terms of the statute. *Davis v. Alvord*, 94 U. S. 545; *Pilz v. Killingworth et al.*, 20 Ore. 432; *Ford Gold Mining Co. v. Langford et al.*, 1 Colo. 62; *Anderson v. Bingham, Teague & Co.*, 1 Colo. Ct. App. 222.

Tested by these simple rules the complaint did not state a cause of action for the foreclosure of a mechanics' lien. There was no allegation descriptive of the labor performed, from which it could be ascertained whether the work was of the sort which would entitle the claimant to a lien, no averment that a notice of lien had been filed which in its particulars was in conformity with the statute, and generally there was an absence of all allegations from which even inferentially it could be determined that Flinn had ever acquired a right to a lien on the property. Wanting these essentials, the complaint evidently failed to state a cause of action as upon a mechanics' lien which the plaintiff was entitled to enforce.

While these allegations were wanting, the plaintiff did aver, without stating its form, its substance, or its contents, that he had filed a lien in Bent county, whereby it becomes evident that in Prowers and Otero counties no notice had been put on record, according to the statutory requirement. The complaint and the decree both show that the canal which, with all of its franchises, right of way, head-gates, etc., was ordered to be sold, runs through all three of these counties, and the court in its judgment, and evidently without proof of the filing of a notice in any other than Bent county, decreed the lien to be coextensive with the length of the canal, and to reach all the property of the defendant company, wheresoever it might be situate, and on which the plaintiff claimed to have done work. Manifestly this did not accord with the law, for where the statute requires (General Statutes, § 2140) that the party who claims a lien shall file his notice in the county where the property is situate, the notice must be filed in every county wherein the land or property is located, on which the lien is claimed to cover. This has been adjudged in the case of a railroad company where the contractor sought to foreclose a lien which was asserted to be coextensive with the line of the road, though filed in but one county through which it ran. *Boston & Co. v. C. & O. R. R. Co. et al.*, 76 Va. 180.

There can be no difference in principle between the enforcement of a lien against the line of a road, and the foreclosure of a like claim against a canal which runs for many miles and through different counties. It is wholly unnecessary to determine whether Flinn could enforce his claim against that part of the canal located in Bent county, because he was not entitled by reason of the deficiencies in his complaint to enforce a lien at all. If the case ever reaches the stage, by amendment or otherwise, whereby Flinn becomes entitled to assert his claim, if he has one, the court, in the light of the authorities herein cited, will be able to determine the extent to which he ought to go.

Since the complaint did not state facts sufficient to con-

stitute a cause of action for the foreclosure of a lien, and the decree adjudged him entitled to rights which he did not possess, it is apparent that this cause must be reversed and remanded.

Reversed.

THE CITY OF PUEBLO, APPELLANT, v. PINCKNEY, APPELLEE.

APPELLATE PRACTICE.

Where there is evidence to support the verdict, judgment thereon will not be disturbed.

Appeal from the District Court of Pueblo County.

Mr. M. G. SAUNDERS, for appellant

Messrs. MCFEELEY & MCALLINEY, for appellee.

REED, J., delivered the opinion of the court.

This suit was brought by appellee against the city of Pueblo to recover damage for a personal injury received by a fall upon the street, through the alleged negligence of the city in failing to keep a sidewalk in repair. It appears that the sidewalk, where the accident occurred, was constructed of boards laid upon stringers or sills, the boards being eight feet long, the width of the sidewalk, and at right angles to the course of the street. It is shown by the evidence that one board was considerably decayed and weakened, not properly supported from below, that appellee stepped upon it and it settled or sprung down; her foot caught against the next board, or in the opening between the two, caused by the sinking of the board, and she fell, receiving serious and permanent injury.

Issues were properly made by the pleadings, a trial had to a jury, resulting in a verdict for the plaintiff for \$1,645.50, and a judgment on the verdict, from which this appeal was prosecuted. As in all cases of that kind, there was some conflict of testimony. No objections appear to have been made to any testimony offered nor exceptions saved to the ruling of the court. Upon the close of the plaintiff's evidence a motion was made by the defendant for a nonsuit, which was very properly overruled. Error is assigned upon the instructions of the court, but appears to have been abandoned; it is not urged in argument, nor are the instructions set out in the abstract. Appellant's contention is based entirely upon the supposed improper finding of the jury in favor of the plaintiff, as being against the evidence.

The correctness of the instructions being conceded, no questions of law presented, and there being evidence to support the verdict, there is nothing for this court to review. It is clearly the province of the jury to find the facts in a case, and unless there is an evident disregard of duty, and a finding is made so at variance with the law and the facts established as to show it the result of improper influence or motives, such finding will not be reviewed. Appellate courts cannot disregard the findings of a jury and substitute themselves in the place of it; within its limits and line of duty its rights and powers are as well defined as those of the presiding judge or the judges of this court. This principle has been so often asserted by both courts of last resort that a recitation of the cases is unnecessary. *Where there is evidence to support the verdict it will not be disturbed*, even though in cases of conflict a preponderance of the evidence appears to be against it; hence the futility of prosecuting appeals where the only error relied upon is the finding of questions of fact by a jury, where the evidence is conflicting.

The judgment of the district court must be affirmed.

Affirmed.

THE CITY OF PUEBLO, APPELLANT, v. SMITH, APPELLEE.**1. MUNICIPAL CORPORATIONS.**

A city, by virtue of the powers granted to it, is bound to keep the avenues of travel within its jurisdiction in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon the corporation to respond in damages to those injured by the neglect to perform that duty.

2. USE OF STREETS.

When a populous city grades and prepares its streets for use and throws them open to the public, it invites the public to use their whole width, and it cannot, after an injury is sustained in consequence of an obstruction in a portion of the street, say that part of such street was intended to be used and part not.

3. NEGLIGENCE PER SE.

Knowingly suffering an obstruction, over which a wagon or carriage could not safely pass, to remain in a public and traveled street, is negligence per se on part of a city.

4. CONTRIBUTORY NEGLIGENCE.

When contributory negligence is relied upon as a defense to an action for damages, that fact must be found from the evidence and circumstances independent of the mere fact that the plaintiff was at the time of the injury engaged in an illegal act.

Appeal from the District Court of Pueblo County.

Mr. G. M. SAUNDERS, for appellant.

Messrs. HARTMAN & GLENN, for appellee.

THOMSON, J., delivered the opinion of the court.

This was an action brought by J. H. C. Smith against the city of Pueblo, a municipal corporation, organized under the laws of the state of Colorado, to recover damages on account of injuries received by him, while driving in one of its public streets, in consequence of coming in contact with a large post set in the street, and protruding a considerable distance above the surface of the ground. The testimony of the plaintiff is, that about half past seven o'clock in the evening, of Octo-

ber 3, 1889, and after it was dark, he was driving along this street, when suddenly the buggy in which he was driving encountered a post and was upset, throwing him to the ground and severely injuring him. He says that he was driving at a moderate gait, probably at the rate of a mile in seven or eight minutes; that he might have been going at a rate of ten or twelve miles an hour; but that his speed was "a moderate jog of a trot, such as ladies drive;" and that he had never seen the post and did not know of its existence. The evidence for plaintiff is that the post was solidly set in the ground, was about twenty-seven inches high, and had been there for about two years before the accident; and although another portion of the street was most generally used for travel, yet that portion was also traveled, and used by the public for the passage of vehicles. Defendant introduced an ordinance of the city of Pueblo which provides that, any person who shall ride or drive any horse, mule or other animal in or through any street within the city at a rate faster than six miles an hour, shall be guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than three dollars, and not more than one hundred dollars.

The giving of instructions numbered one, two, four and eight by the court upon its own motion, and the refusal of an instruction requested by defendant, are assigned for error. In the argument the discussion is confined to the fourth and eighth instructions, and the instruction refused. It seems to have been conceded that if there was such an obstruction as is alleged, defendant was chargeable with notice of its existence, because the instruction declaring the law upon that question was not objected to. The first and second instructions submitted to the jury the question of defendant's negligence, and correctly state what may be considered in estimating the damages. They are unobjectionable so far as we can see, and we presume were so regarded by defendant's counsel, as he gives them no attention in his argument. Instructions four and eight are as follows:

"No. 4. The court instructs the jury that it was the duty

of the defendant, The City of Pueblo, to keep and maintain its streets free from obstructions artificially placed in the streets which would be dangerous to persons traveling upon the streets. Whatever rule of law might be applicable to public streets in the city that had not yet been formally accepted and opened for public use, or in the less frequented portions of the city, in the outskirts of the same, the city might be said to have performed its duty if it provided a safe and convenient traveling way, sufficiently wide for the accommodation of the public, and guarded against danger from the natural or artificial obstructions therein. But the court instructs the jury that in such portions of the city as are frequently traveled and are liable to be traveled, and where the city have accepted the street and graded the same, it is the duty to keep the same free from obstructions to the extent and for the entire width of that portion of the street between the gutters, which by its natural conformation is apparently set apart for public travel."

"No. 8. The court further instructs the jury, that while the answer does not allege contributory negligence as a defense, yet if they find from the evidence of the plaintiff himself, that the injury was occasioned by reason of his driving at a careless, negligent and high rate of speed, and that such act upon his part was the cause of the injury, and that he would not have suffered the same had he been driving at an ordinary and prudent rate of speed upon the public highway, he would be guilty of contributory negligence and could not recover, and it is a question of fact for you to determine from the evidence without regard to any rate of speed fixed by the city ordinances, as to what rate of speed in fact would be negligent."

The following is the instruction refused:

"No. 1. If the jury believe from the evidence at the time alleged in the complaint, and at the time the injury complained of is alleged to have occurred, plaintiff was violating an ordinance of the city of Pueblo, then in force, which said ordinance was introduced in evidence, by then and there driv-

ing upon and along a street in said city, at a rate of speed prohibited by said ordinance, to wit: at a rate of speed exceeding six miles per hour, it constituted negligence upon the part of the plaintiff."

"When municipal corporations are invested with exclusive authority and control over the streets and bridges, within their corporate limits, with ample power for raising money for their construction, improvement and repair, a duty arises to the public, by virtue of the powers granted, to keep the avenues of travel within such jurisdiction in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon the corporation to respond in damages to those injured by a neglect to perform the duty." *City of Denver v. Dunsmore*, 7 Colo. 328.

The fourth instruction correctly states the law in regard to the duty of cities to keep and maintain their streets free from obstructions, which would be dangerous to persons traveling therein. This instruction is however objected to because, as counsel claims, it declares, as matter of law, that it is the duty of a municipal corporation to keep the entire width of its streets in repair; that the post, if it existed, was such an obstruction as to render the city liable for the injury it occasioned, and that that portion of the street shown to be in repair was not sufficient to accommodate travel thereon. By no analysis of the instruction can the implication be found that the portion of the street shown to be in repair was not sufficient to accommodate travel thereon. Neither do we think it can be fairly implied from the instruction that it is the duty of municipal corporations to keep and maintain the entire width of its streets in repair; or that the post, if it existed, was such obstruction as necessarily rendered the city liable for the injury occasioned, but, if these two propositions had been given to the jury in direct terms, we do not conceive that the instructions would be therefore erroneous. Whatever may be the rule applicable to small towns, or the country, when a populous city grades and pre-

pares its streets for use, and throws them open to the public, it invites the public to use their whole width, and it cannot say after an injury is sustained, in consequence of an obstruction in a portion of a street, that part of such street was intended to be used and part not. The purpose of opening a street is that it may be traveled; the duty of keeping it in a reasonably safe condition extends to one part as well as to another, and on principle we are unable to see why it should escape liability, because an obstruction causing an injury was placed on a particular portion of the street instead of somewhere else. *Montgomery v. Wright*, 72 Ala. 411; *Saltmarsh v. Bow*, 56 N. H. 428. The instruction however does not go to this extent, and there is evidence that the part of the city where the accident occurred, was actually used by the public, who avoided the post by going around it.

If the obstruction complained of had been comparatively trifling in its dimensions and character, so that it was doubtful if the passing over it of the wheels of a vehicle would occasion any injury, then it would have been for the jury to say, under proper instructions, whether permitting it to continue was negligence on the part of the city; but there is nothing doubtful about the obstruction described by the witnesses. We do not think that the wheels of a wagon or carriage could safely pass over a post eight by eight inches, or even less, firmly imbedded in the ground and projecting above the surface twenty-seven inches. Knowingly suffering such obstruction to remain in a public and traveled street was negligence *per se*, and to have so declared it would not have been error.

The remaining question arises out of the giving of the eighth instruction, and the refusal of defendant's instruction. In disposing of this, the effect of the ordinance upon the question of plaintiff's contributory negligence, is the only important matter to consider. The proposition submitted by defendant's counsel is, that "a city ordinance passed in pursuance of the power conferred by the legislature, has the force of an express statute, and every violator thereof is a

wrongdoer, and *ex necessitate*, negligent in the eyes of the law," and he argues further that, if the plaintiff was driving over the street at a greater rate of speed than six miles an hour, the city owed him no duty, and contributory negligence was conclusively established against him. This is not the law. If the plaintiff, while driving at a rate of speed in excess of that limited by the ordinance, had run into and injured some other person using the street, the evidence that his speed was illegal might have sufficient proof of negligence as against him in the first instance, although it would not be conclusive, and it would not excuse the contributory negligence of the person injured. Cooley on Torts (2d ed.), 804.

But it seems to be quite well settled that the fact that one is engaged in violating the law does not prevent him from recovering damages for an injury which could have been avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury. 2 Thompson on Negligence, 1161, and cases cited; Beach on Contributory Negligence, § 257.

In the case of *Baker v. Portland*, 58 Me. 199, this precise question was elaborately discussed. There, as here, the plaintiff was injured in consequence of a defect in a street, while driving over it. The ordinance made a rate of speed greater than six miles an hour unlawful. The defendant contended that the fact that plaintiff was in the act of violating the law at the time of the injury, was a bar to the right of recovery. The jury were instructed in that case as they were in this, that defendant's contributory negligence must be found by them independently of the mere fact that he was engaged in an illegal act. The court held that while the violation of the ordinance might subject the offender to a penalty, unless the commission of the act contributed to produce the injury, the negligence of the defendant was not thereby excused; and stated that the true question was whether plaintiff was using due and reasonable care under all the circumstances, or whether a want of care on his part contributed to produce the injury. The judgment of the court below was sustained.

The eighth instruction states the law applicable to this case correctly, and inasmuch as the instruction asked by defendant contains the proposition that driving along the street at a rate of speed prohibited by the ordinance, constituted negligence on the part of the plaintiff, it was properly refused. No error appears upon the face of the record, and the judgment must be affirmed.

Affirmed.

MEYERS, PLAINTIFF IN ERROR, v. HART, DEFENDANT IN ERROR.

1. NONSUIT.

Complaint in replevin; answer, a general denial, and a second defense disclosing the true nature of the transaction and setting up a settlement, in which all the matters were adjusted and payment and full satisfaction made: replication by plaintiff. *Held*, that the insufficiency of the evidence to sustain the complaint is not ground for a nonsuit.

2. SPECIAL VERDICT.

It is discretionary with the jury to render a general or special verdict in an action for the recovery of money only, or of specific property. In such cases the court has no power to order special findings.

Error to the District Court of La Plata County.

IN August, 1885, plaintiff instituted suit against defendants, A. C. Meyers, George E. West and Frank H. West, in replevin, alleging that in October, 1880, he was the owner of 450 head of cattle and 16 head of horses, and that in November, 1880, the defendants appropriated the property and converted the same to their own use, praying judgment for \$15,000. Defendants, Meyers and Frank H. West, answered generally, denying the allegations in the complaint, and specifically by second answer, alleging that in the fall of 1880 the plaintiff was indebted to sundry persons to the amount of \$10,000; that to secure the sum of \$7,500 of such indebted-

ness, on the 8th day of September, 1880, he made and delivered a chattel mortgage on a lot of cattle then in La Plata county to one John H. Werkheiser, payable on or before October 10, 1880; that at maturity plaintiff was not able to pay the debt; that about December 1, 1880, plaintiff and defendants entered into an agreement whereby plaintiff sold, transferred and turned over to the defendants the stock covered by the chattel mortgage to Werkheiser, and all other cattle and horses on the range owned by plaintiff, and executed a bill of sale in writing; that the defendants on their part agreed with the plaintiff that they would assume and pay the indebtedness due to Werkheiser. That the cattle and horses alleged in the complaint to have been converted to the use of the defendants were the cattle and horses covered by the chattel mortgage, and sold and transferred to the defendants by the bill of sale, and that such stock was all that came into the possession of the defendants; that it was further agreed that defendants should sell any or all of the cattle and horses if they should see fit to do so, pay off the mortgage debt, pay themselves for their trouble and all expenses of herding and caring for the stock, and other necessary expenses; that in pursuance of such agreement plaintiff delivered the possession to the defendants of all cattle and horses he owned on the range, the number unknown, but to be ascertained when the stock was gathered. That in pursuance of such agreement defendants paid off and discharged the Werkheiser mortgage, and the cost of keeping and gathering the cattle, and all other incidental expenses and charges. That in October, 1882, at the town of Durango, they had a full and complete settlement of all matters between them pertaining to the stock. That in such settlement the defendants returned and delivered to the plaintiff on the respective ranges all the stock not sold or disposed of by them, which was received and accepted by the plaintiff. At the same time an account was taken and stated between the plaintiff and defendants of all matters in difference between them; that upon such statement and accounting a balance was

found due the plaintiff, for which they turned over and delivered to the plaintiff two horses, which were received by the plaintiff in full satisfaction and discharge of the balance so found due.

A replication was filed denying each allegation in the answer. George E. West filed a separate answer, disclaiming all interest and participation in the transactions as a principal, averring that the only action he ever took in the premises, and the only connection he ever had with them, was as an employee of Meyers and Frank H. West, and as their agent.

On the issue so made the case was tried to a jury. At the close of plaintiff's testimony a motion for a nonsuit was made, which was overruled by the court and an exception taken. A large number of errors are assigned, the first five being to the admission and rejection of evidence. The court gave to the jury upon its own motion ten instructions, on each of which errors were assigned. The refusal of the court to give four instructions prayed by the defendants is assigned as error. It was also assigned as error that the court modified three instructions prayed by the defendants. Counsel for the defendant asked the court to propound to the jury for special findings and answers a list of specific questions, which were refused by the court, and exception taken. The jury found for the plaintiff as against Meyers and Frank H. West in the sum of \$800, and as to George E. West the finding was for the defendant. Meyers and Frank West moved the court to set aside the verdict and for a new trial, which was denied. Judgment entered upon the verdict and an appeal taken by A. C. Meyers to this court.

Messrs. RUSSELL & McCLOSKEY, for plaintiff in error.

Mr. ADAIR WILSON and Messrs. THOMPSON & INGERSOLL, for defendant in error.

REED, J., delivered the opinion of the court.

This case is rather peculiar. It started in as an action of

replevin, and came out as a money demand for money received by the defendants to the use of the plaintiff and a settlement of accounts, but this is only one of its peculiarities ; there are several others.

Defendants' counsel, at the close of plaintiff's testimony, made a motion for a nonsuit, which was overruled. This is assigned for error, and most of the argument is devoted to the discussion of this assignment, contending that the suit as brought in replevin was in no way sustained by the evidence. The position is correct. There was no evidence of an illegal taking or an illegal conversion. Had the defendants been content to traverse the allegations in the complaint, the contention might have prevailed, and the refusal to grant a nonsuit be held erroneous ; but, after denying all the allegations in the complaint, they interpose what they call a "second defense," in which the true nature of the transaction is disclosed, and setting up a settlement at a certain date, in which all the matters were adjusted, and payment and full satisfaction. To this a replication was filed, and new issues, tendered by the defendants, were formed ; these issues were tried and the identity of the original action was lost. This being the case, it was not error to refuse the nonsuit and try the issues made. That it was rather a phenomenal departure and transformation must be conceded.

One of the very few facts satisfactorily established by the evidence was that the defendant in error was greatly in debt, perhaps in excess of his assets and ability to pay. That to secure to Werkheiser \$7,500 due him he had made a chattel mortgage of his stock on the range, which was about to mature, and, being unable to meet it, he made the arrangement whereby he conveyed by bills of sale to plaintiff in error and his partner, West, the cattle, horses and other property, and gave a power of attorney also, and they went into possession, at least constructive, of the property. They were to discharge the chattel mortgage, care for, herd, drive and dispose of the stock, etc., and although upon the trial it was attempted to be shown that the sale was absolute, the answer of the

defendants, attempted settlement, and various payments of money made from time to time to the plaintiff, and the delivery of certain of the property, establishes beyond controversy that the parties were not *bona fide* purchasers, but trustees or agents, who, after paying the designated claims and themselves for care and disbursements, were to pay over the surplus to Hart. For two years following the transaction the defendant Hart gave no attention whatever to the stock. It was then the attempted settlement occurred. The plaintiff in error and his partner, West, attempted to account for all the property converted by them, and reconveyed the supposed remnant remaining on the range—but no remnant was found. Matters remained in this condition until 1885, when this suit was brought.

The evidence was very vague and unsatisfactory. At the time of the transfer Hart had no knowledge of the number, classification or kind of stock he was selling, nor did he at any subsequent time have any means of knowing the number at the time of the transfer. An attempt was made by plaintiff upon the trial to furnish data, by which the jury could arrive at an approximate of the number of cattle, by showing the number he had turned out long before upon the range, and by some guesses of what the natural increase should be. Nothing could be more indefinite or unsatisfactory. The different adverse agencies, stealing, straying and starving, might leave the herd, after two or three years, less in number than the original stock. It of course was to the interest of the plaintiff to make the herd as large as possible, while the defendants, having to account for it, were influenced to make it small as possible. Much of the evidence of both parties was hardly admissible, but was probably allowed by the court through necessity, being the best attainable.

I am at a loss to know how the jury found any data upon which to base a verdict. It must have been from the concessions of defendants and their employees as to the amount and value of the property disposed of, and this, perhaps, was sufficient. The most that can be said of all the evidence in the case is, that it furnished the jury a basis from which they

could deduce conclusions. The errors assigned upon the admission and rejection of evidence are not relied upon in argument, and an examination shows that they were not serious, and that they were nearly evenly balanced. A strict application of the rules of evidence would so emasculate the case as to leave very little.

Numerous errors are assigned upon the instructions given and refused, but they are not urged in argument, nor any attempt made to show wherein they were faulty. Notwithstanding this, we have carefully examined the whole mass, given and refused, and find no serious error. The charge given by the court upon its motion, taken as a whole, seems to be eminently fair, and the law controlling the case fairly stated. The modifications of those given upon the prayer of defendants were proper and necessary—those refused were embraced in the charge by the court.

It is urged that the judge erred in declining to submit to the jury a long series of questions for special findings. This contention cannot prevail. Upon the issues made by the answer and replication, which were the only issues tried, the answers to the questions proposed, with two exceptions, could have no bearing whatever, being directed to the supposed illegal conversion of the property, a position abandoned or ignored at the outset. The exceptions were the questions, "Was there a final settlement between plaintiff and defendants?" And "Was George E. West a party to the contract?" The first was fully answered by the general verdict, and the second by a verdict in his favor.

In sec. 181, Civil Code, it is provided, "In an action for the recovery of money only or specific property, the jury, in their discretion, may render a general or special verdict."

"In all other cases, the court may direct the jury to find a special verdict in writing," etc.

In the case this subsequently became, it was discretionary with the jury. The court had no power to order special findings. See *Thompson v. Gregor*, 11 Colo. 534.

The judgment of the district court will be affirmed.

Affirmed.

BOARD OF COUNTY COMMISSIONERS OF PROWERS COUNTY,
PLAINTIFF IN ERROR, v. PUEBLO & ARKANSAS VALLEY
RAILROAD COMPANY, DEFENDANT IN ERROR.

1. STATUTORY CONSTRUCTION.

When a statute gives a new power and at the same time provides the means of executing it, the power can be executed in no other way.

2. TAXATION—SCHOOL TAXES.

The power to levy a special tax in a school district of the third class is by statute vested in the electors thereof, and cannot be exercised by the board of directors.

Error to the District Court of Prowers County.

Mr. J. B. TRAXLER, for plaintiff in error.

Mr. CHARLES E. GAST and Mr. C. C. GOODALE, for defendant in error.

REED, J., delivered the opinion of the court.

An agreed statement of facts was filed in the court below from which it appears that school district number 18 in the county of Prowers was a school district of the third class; that the defendant had taxable property in the district to the value of \$51,425; that on the 4th day of May, 1891, the annual meeting of the electors of the school district was held, and a director elected for the term of three years. At such annual meeting no question in regard to a special school tax was submitted to the electors, and no vote taken. No special meeting of the electors was called or had during the year, consequently such question was in no way submitted to the electors. Some time during the month of May the directors of the district met, and ordered a special district school tax of 7 mills on the dollar on the taxable property of the district. A certificate of such levy was filed with the board of county commissioners (plaintiff in error), the tax assessed with other

taxes. The amount of such special tax against the property of the defendant amounted to \$359,98, the payment of which was resisted, an action instituted. Upon the hearing the suit was dismissed.

Only one question is involved: Had the directors the power to make the assessment? The right and power of school districts to assess and collect special taxes for school purposes is purely statutory. No aid in the determination of the question can be gained from outside sources; it can only be determined from the statutory provisions and their construction, according to well known and generally accepted rules.

In sec. 3036, Gen'l Stat., it is ordered, "In districts of the first and second classes the boards, after organization, shall exercise all the powers given to the *electors of districts of the third class as specified in sec. 62 (Gen'l Stat., sec. 3058) of this act.*"

In sec. 3058 it is provided, "*The qualified electors of districts of the third class*, when assembled at any regular or special meeting, shall have power: * * *

"Fourth. To order such tax on taxable property of the district as the meeting shall deem sufficient for any of the following purposes." (Enumerating them.)

Sec. 61 (3057) is as follows:—"In any district of the third class the board of directors may at any time call a special meeting of the electors of such district for any of the purposes specified in section sixty-two (62) of this act, and it shall be their duty to call such meeting, if petitioned so to do by ten (10) legal voters of the district. Notices, specifying the time, place and object of such meeting, shall be posted in three (3) public places, one of which shall be at the place of meeting, at least twenty (20) days prior to the time of holding such meeting."

By sec. 29 of the acts of 1887, p. 398, sec. 67 was amended as follows: "On or before the day designated by law for the commissioners of each county to levy the requisite taxes for the then ensuing year, the school board in each district shall certify to the county commissioners the number of mills per

dollar which it is necessary to levy on the taxable property of the district, to raise a special fund for any of the purposes specified in section 51 of this chapter, and the county commissioners shall cause the same to be levied at the same time that other taxes are levied, and the amount of such special tax which shall be assessed to each tax-payer of such district, shall be placed in a separate column of the tax-book, which shall be headed 'Special School Tax;' Provided, That a school board of a district of the third class shall not certify, as above, to a higher rate than fifteen mills per dollar."

Also last clause: "And, provided further, That the board of any district may order the levy of not to exceed one tenth of one mill, the proceeds of which shall be used exclusively in the purchase of books for a library, to be open to the public, under such rules as the district board may deem needful for the proper care of the said library."

It will be seen that in districts of the third class the power to levy a special tax is conferred only upon the electors. No power is given the board of directors to levy any special tax, unless the last paragraph of sec. 29 of the act of '87 should be construed as allowing the board to levy the tax of one tenth of one mill for library purposes. Whether it does or does not is not necessary to be determined in this case. According to well established rules of statutory construction, in districts of the third class, the power being vested in the electors, is to the exclusion of the board of directors, and the power could not be assumed without an affirmative provision authorizing it; none such is found. "When a statute gives a new power and at the same time provides the means of executing it, those who claim the power can execute it in no other way." *Andover & Turnpike Co. v. Gould*, 6 Mass. 40; *Franklin Glass Co. v. White*, 14 Mass. 286.

"Where an act of parliament gives authority to one person expressly, all others are excluded. A special power is ever to be strictly pursued." Potter's Dwar. on Stat. 275.

"A purely statutory authority or right must be pursued in

strict compliance with the terms of the statute." Endlich on Stat. 493; *Rex v. Loxdale*, 1 Burr. 145; *Rex v. All Saints*, 13 East. 143.

"Statutes by the authority of which a citizen may be deprived of his estate must have the strictest construction, and the power conferred must be executed precisely as it is given, and any departure from it will vitiate the proceedings; and this is so whether it be in the exercise of a public or private authority, whether it be ministerial or judicial." Potter's Dwar. on Stat. 146; *Sherwood v. Reade*, 7 Hill (N. Y.), 431; *Striker v. Kelley*, 2 Denio (N. Y.), 323.

These are but a few of the many authorities based upon the well known maxim, "*Expressio unius est exclusio alterius*." They might be multiplied indefinitely. The power to assess a special tax in school districts of the third class, being by statute conferred only upon the electors, the assumption of the power by the directors was unwarranted and the levy invalid.

The judgment dismissing the action must be affirmed.

Affirmed.

LAWRENCE, APPELLANT, v. WEIR, APPELLEE.

1. BROKER'S COMMISSION.

Before a broker can be said to have earned his commission he must produce a purchaser who is ready, willing and able to purchase the property upon the terms and at the price designated by the principal, and he must have been the efficient agent or procuring cause of the sale.

2. PRACTICE.

A verdict which is so clearly against an overwhelming weight of testimony that, if not willfully wrong, it could have resulted only from misapprehension or mistake of the law, should be set aside.

Appeal from the District Court of Arapahoe County.

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Mr. F. A. WILLIAMS, for appellant.

Mr. RICHARD WOLFE, for appellee.

REED, J., delivered the opinion of the court.

Appellee (plaintiff below) brought the suit to recover commissions alleged to have been earned as a real estate broker in the sale of a residence property on Ogden street in the city of Denver, owned by appellant (defendant), and purchased by F. C. Goudy, Esq. Defendant was the owner of two residence properties, one new, upon Venice street, and the other, the one sold, occupied by himself and family—placed them for sale with one F. Morey, a real estate broker with whom plaintiff was connected in some way, or operating. After the sale of the Ogden street property, Morey assigned his claim for commissions to appellee, who instituted the suit. The case was tried to a jury, resulting in a verdict for the plaintiff for \$280. Judgment was entered upon the verdict, and an appeal taken to this court.

Numerous errors are assigned, several upon the admission and rejection of evidence, one upon the refusal of the court to sustain a motion for a nonsuit, several to instructions given and refused, and a general one, that the judgment was against the law and the evidence. Most of them will be disregarded. A nonsuit should have been granted. There was an absolute failure in the proof of the plaintiff to make a case within the law governing such transactions, and the verdict was so clearly against an overwhelming weight of testimony, that if not willfully wrong it could only have resulted from misapprehension, or mistake of the law.

The law in this class of cases is well settled. First, before the broker can be said to have earned his commission he must produce a purchaser who is ready, willing and able to purchase the property upon the terms and at the price designated by the principal. Second, the broker must be the efficient agent or procuring cause of the sale. He must find the pur-

chaser, and the sale must proceed from his efforts acting as broker. *Babcock v. Merritt*, 1 Colo. Ap. 84; *Hungerford v. Hicks*, 39 Conn. 259; *Tombs v. Alexander*, 101 Mass. 255; *Bernard v. Marmat*, 3 Keyes (N. Y.) 203; *Reese v. Spruance*, 45 Ill. 308; *McClure v. Paine*, 41 N. Y. 561; *Lloyd v. Matthews*, 51 N. Y. 124; *Lyon v. Mitchell*, 36 N. Y. 235; *Briggs v. Rowe*, 4 Keyes (N. Y.) 424; *Murray v. Currie*, 7 Car. & P. 584; *Wilkinson v. Martin*, 8 Car. & P. 5.

To apply the law and make the opinion intelligible, an examination and synopsis of the evidence is necessary. One fact is well established—that appellee and Goudy were negotiating for the sale and purchase of the Venice street property, which would have been consummated but for a stable, considered a nuisance, on land adjoining, which the defendant could not get removed, and the purchase was abandoned. During the negotiations defendant and Goudy had not met; defendant was represented by the plaintiff.

In regard to the Ogden street property, finally purchased, plaintiff testified that while negotiations were going on in regard to the Venice street property “I mentioned the other property to them (Goudy and Cloud), and on the way home pointed out to them the Ogden street property. *I don't know that in pointing it out I said whose it was.*” “I drove Mr. Goudy past the Ogden street property at first * * * and pointed it out while I was showing other properties to Mr. Goudy.” Again, “I say Cloud and Goudy went out with me riding, to look at some property, and I pointed out this property to them on the way, riding in the buggy on Ogden street. I went down in front of the property. I did not afterwards take either of them to the property.”

This is all of the plaintiff's testimony directly connecting him with the transaction. He never informed his alleged principal that he had a possible purchaser; never gave Goudy the name of the owner of the property, never brought the parties together, nor gave a price, nor showed the property. His only claim is that in company with Goudy and Cloud he drove by the property and from the street pointed it out as

being for sale, and this was shown by Goudy and Cloud to have been a mistake. Considerable evidence by Morey and plaintiff was admitted in regard to negotiations with Cloud, who was assumed to be the agent of Goudy, which was denied by Cloud and Goudy. It is not important to determine which is correct; no agency of Cloud has been established, and the fact was, he was not, at the time of the alleged interviews, the agent of Goudy to buy, but was trying to find some suitable property to sell to him in the hopes of making a commission from the owner, consequently the testimony in regard to interviews with Cloud, without establishing an agency, was improperly admitted. Nearly all the testimony given by Morey was inadmissible; it was in regard to his conversations with the plaintiff—his own agent, and Cloud, the assumed agent of Goudy—but nothing as to the defendant or Goudy, and the sale of the Ogden street property.

Goudy was called *by the plaintiff*, was clearly a disinterested witness. His testimony, by which plaintiff was bound, should have been conclusive of the whole case. He minutely detailed the entire transaction from first to last, showing that the plaintiff in no way participated in the transaction; that plaintiff never mentioned the property as being for sale; that plaintiff did not drive through the street even, and point it out to him; in fact, did not drive into Odgen street at all, and in this he was corroborated by Cloud, who plaintiff alleged was with them on the occasion. Goudy narrated the circumstances under which he first met the defendant, made his acquaintance, and learned of the Ogden street property from him. Goudy was anxious to buy the Venice street property, if the stable nuisance could be abated. After some three weeks' negotiation with plaintiff, without getting anything definite in regard to the removal of the stable, he stopped at the property on Venice street and found Mrs. Lawrence, wife of the defendant, preparing the house for occupancy. With a view, if possible, of concluding a purchase, he asked her where Mr. Lawrence (defendant) could be found, and was directed to the Ogden street property, where

he found him. It was the first time they had met, or that he (Goudy) had any knowledge whatever of the property. The house was torn up for modern improvements, and defendant informed him when they were completed the property would be for sale. A day or two after Mr. and Mrs. Goudy examined the house and got the proposed price, after the improvements were completed.

The negotiations between defendant and Goudy commenced on the basis of the defendant completing a portion of the improvements and Goudy assuming the balance—there was a difference in regard to the price. Goudy, who was going away, employed Cloud, giving him a certain amount, provided he succeeded in getting the property at a certain price. Cloud met defendant, and after two or three interviews the price was made satisfactory, and on Goudy's return, about three days after, the purchase was closed. This was the only agency of Cloud for Goudy. This it will be remembered was the evidence of plaintiff's witness, showing conclusively no participation of the plaintiff. This was supplemented and corroborated in every important particular by the defendant and by Cloud, who were called for the defense.

Taking the case as made by plaintiff, alone, it will at once be seen that it did not comply with the requirements of the law, and when even that was destroyed by his own witness, Goudy, it is apparent that the court erred in refusing the motion for a nonsuit.

The verdict of the jury was not only unwarranted by the evidence, but directly against it. There was no conflict in the legal acceptation of the term, the only conflict was between the plaintiff and his own witness Goudy, whose evidence was destructive of his case.

It is not necessary to review the instructions. They were evidently, some of them at least, utterly disregarded by the jury, and for that reason the verdict should have been set aside. Suits of this character, having no legal foundation, or at least very questionable in character, have become quite

frequent; far too frequent. The rules of law are plain and simple. "The broker must be the efficient agent or procuring cause of the sale. The means employed by him and *his efforts must result in the sale*. He must find the purchaser and the sale must proceed from his efforts acting as broker."

These facts legally established by competent evidence entitle the broker to his commission, and the courts will aid in its recovery, but nothing short of this will suffice; it opens up too broad a field for the practice of fraud and the levying of unwarranted tribute. The law in this class of cases has been strained to its utmost tension, and juries go no further than courts. Judgments have been obtained on the most shadowy grounds of supposed intervention by the broker. If the broker honestly earns his fee he should have it, but the property owner seems to be the party needing protection.

In this case the broker employed was Mr. Morey. No contract was made with the plaintiff. That the claim was not prosecuted by Morey, but assigned to plaintiff, is a circumstance that should not pass unnoticed.

The judgment will be reversed and cause remanded.

Reversed.



JONES, PLAINTIFF IN ERROR, v. SULLIVAN, DEFENDANT
IN ERROR.

APPELLATE PRACTICE.

When the testimony is conflicting and the judgment is not manifestly against the weight of the evidence, it will not be disturbed.

Error to the District Court of Gilpin County.

Mr. ROBERT E. FOOT, for plaintiff in error.

Mr. HUGH BUTLER, for defendant in error.

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THOMSON, J., delivered the opinion of the court.

Several questions are presented by the record in this case, only one of which it will be necessary to notice. The plaintiff below, who is plaintiff in error here, alleges that on June 23, 1876, she conveyed to the defendant, Dennis Sullivan, an undivided one half of the Potosi lode, in Nevada mining district, Gilpin county, Colorado, the consideration being that defendant would endeavor to effect a sale of the property; that afterwards, on August 14, 1876, upon the pretense by him that he could more conveniently adverse the application for United States patent of the Burrough's Extension lode, which conflicted in its surface boundaries with the Potosi, if the title to the whole claim was in him, she conveyed to him the remaining one half of the Potosi, he agreeing that when the adverse was made he would reconvey this half to her; that defendant after relocating the claim as the Kansas lode, sold it to one James C. Fagan, and has never accounted to plaintiff for her interest in the property, or reconveyed it to her. Some other matters are alleged, but as they have no connection with the controlling question in the case it is unnecessary to state them.

Defendant answers, denying the consideration as it is alleged in the complaint; and avers that he purchased plaintiff's interest in the property for five hundred dollars. The only witnesses to the transaction were Aaron M. Jones, the husband of the plaintiff, through whom as her agent the transfer was negotiated and consummated, and the defendant. Jones' testimony supported the complaint, and Sullivan's the answer. Their testimony was in direct conflict. There were some circumstances shown which seemed to corroborate Sullivan. Their testimony was given in open court, and after hearing it the court gave judgment for defendant.

The judge before whom the cause was tried possessed advantages for judging of the credibility of the witnesses, and arriving at the facts, of which we are deprived. He not only heard the witnesses, but saw their manner and bearing, and

was therefore better qualified to draw correct conclusions from the testimony than we are. The judgment is not manifestly against the weight of the evidence ; on the contrary, if there is a preponderance, we think it is in favor of the judgment rendered, which we cannot do otherwise than affirm.

Affirmed.



THE DENVER AND BERKLEY PARK RAPID TRANSIT COMPANY, APPELLANT, v. DWYER, APPELLEE.

1. CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION OF LAW.

The question of negligence is a mixed one of law and fact, and when a case is merely one of negligence against negligence, if from the entire evidence it clearly appears that the injured party acted otherwise than as a man of ordinary prudence, and was guilty of negligence contributing to the injury, the question becomes one of law and may be determined by the court without submitting it to the jury.

2. CONTRIBUTORY NEGLIGENCE, WHEN NOT A BAR.

Notwithstanding a plaintiff may have been guilty of contributory negligence, yet if the defendant, with knowledge of his exposed condition, failed to exercise reasonable care and prudence to avoid the consequences of his negligence, he may nevertheless recover.

3. INSTRUCTIONS.

Instructions in an action for damages for personal injuries should be clear and definite as to facts, the existence of which would create a liability.

Appeal from the District Court of Arapahoe County.

Messrs. JAMES H. BROWN, MILTON SMITH and Mr. A. B. SEAMAN, for appellant.

Mr. GEORGE D. TALBOT and Mr. RALPH TALBOT, for appellee.

THOMSON, J., delivered the opinion of the court.

The Denver and Berkley Rapid Transit Company was, on

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the 25th day of July, 1890, a corporation, owning and operating a line of railway in Arapahoe county, Colorado, and was a common carrier of passengers for hire. This railway was a street railway, drawn by a steam motor, and at its terminus nearest Denver, connected with a cable line running into the city. On the day named, Michael Dwyer, the plaintiff, was a laborer in the employ of the defendant, working upon its railroad bed and tracks, under the direction and control of a section boss in its service. When its employees were working on its road at a point remote from Denver, it was its custom, at the close of the day's work, to transport them back to the city on a hand car. On the evening of the day mentioned, when the work had closed, the hand car being absent, plaintiff and his fellow workman were ordered by the section boss to board one of the defendant's passing trains, but not to mingle with the passengers; and the cars being somewhat crowded, plaintiff took a seat on the front platform of the motor. This platform was an open space about eighteen inches wide, running across the motor, with an iron guard in front, and the boiler and machinery of the motor behind. Plaintiff took a seat on the right side of the motor, resting his feet on a bar or step perpendicularly under the edge of the platform, with his knees necessarily projecting beyond the edge of the platform, which was on a line with the side of the motor.

At the Denver terminus of the railway there was what is termed a "Y," with an automatic switch where the first arm of the "Y" left the main track, and another switch thrown by hand where this arm joined the other to make the stem of the "Y." Beyond this on the stem was a coal house, and between the last switch and the coal house, on the side occupied by plaintiff, was a perpendicular embankment caused by a cut, and which was so close to the track that in places the motor grazed it as it passed. There was evidence that trains were accustomed to stop between the automatic and the hand switch for the purpose of having the switch thrown, so that they could pass upon the stem of the "Y," and that

at this place passengers on the train usually left it and others entered it, after which the train passed upon the stem of the "Y," and then backed up a short distance on the other arm to the regular station of the defendant. Plaintiff boarded the motor on this occasion with the intention of alighting when it reached the stopping place between the switches. As he mounted the motor he spoke to the engineer, saying that he thought this as comfortable a place as he could get, to which the engineer replied that it was. There was evidence that the engineer could plainly see him where he was sitting. There was also evidence that plaintiff and his co-employees, in addition to the order from the section boss, had orders from defendant's superintendent to ride to and from their work on the train when the hand car was absent. Plaintiff was a laborer and about sixty years of age.

On the evening in question, before the arrival of the train at the stopping place between the switches, the hand switch was thrown by a man stationed there, relieving defendant's servants on the train from that duty, and rendering it unnecessary for the train to stop for that purpose. There is evidence that occasionally this was done. In the expectation of alighting at this stopping place, plaintiff had arisen from his sitting posture, and was standing on the bar or step with his knees still projecting, his body necessarily somewhat thrown forward on account of the position of the step, and holding on to the iron guard or railing of the platform. The train did not stop, but passed the switch at a considerable rate of speed, and continued until it entered the cut some sixty or seventy feet further on, and brought plaintiff into violent contact with the embankment, broke his leg and otherwise injured him. At the close of plaintiff's case, defendant moved the court for a nonsuit on the ground of contributory negligence. The motion was denied.

The question of negligence is a mixed one of law and fact, and where a case is merely one of negligence against negligence, if from the entire evidence it clearly appears that the injured party acted otherwise than as a man of ordinary pru-

dence would have done in like circumstances, and was guilty of negligence, contributing to the injury, the question becomes one of law and may be determined by the court without submitting it to the jury. But the instances in which this has been done are rare, and to justify a court in thus disposing of the question, the negligence must be clearly defined and palpable.

As the judgment below must be reversed upon other grounds we deem it unnecessary to pass upon the legal effect of the evidence concerning plaintiff's negligence, or to say, as a matter of law, whether or not his occupancy of the motor platform, with a portion of his person projecting therefrom, or his assuming a standing posture, when the train approached the switch, constituted such negligence.

It is well settled that notwithstanding the plaintiff may be chargeable with negligence, without which he would not have received the injury complained of, yet, if the defendant with knowledge of his exposed situation, did not exercise reasonable care and prudence to avoid the consequences of his negligence, he may nevertheless recover. Whether or not the place between the switches where, as the evidence tends to show, defendant's trains were accustomed to stop, and passengers to leave, and others enter, was such regular stopping place that the public and persons riding on the trains had a right to rely upon being able to alight there, was a question exclusively for the jury. But whether such was the fact or not, it was the duty of the engineer in charge of the motor to stop the train before it reached the embankment, if he knew the dangerous position of plaintiff in time to bring the train to a halt, and failing in that the prior negligence, if any, of plaintiff would not excuse him.

In *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 558, the court approved the following instruction given by the court below: "There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover, if he him-

self be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." Concerning this instruction, Mr. Justice Gray, delivering the opinion of the court, says: "The qualification of the general rule, as thus stated, is supported by decisions of high authority," citing a number of cases. The principle has been frequently announced, both by English and American courts; there is, so far as we are aware, no conflict of authority upon the subject; and if the question had been properly submitted to the jury by the instructions, we would not be disposed to disturb the verdict.

At the instance of plaintiff, the court instructed the jury as follows: "The jury are instructed that if they believe from the evidence that the plaintiff was on the platform or steps of the engine with the knowledge of the engineer of said train, and that the servants and employees of the defendant company failed to stop said train at the usual stopping place of the train on said road, if you find that there was such usual stopping place, and that the said train was run into said cut and embankment without stopping at said usual stopping place, then the verdict of the jury must be for the plaintiff and against the defendant, unless the jury should further find from the evidence that after the said train had passed said usual stopping place, and had failed to stop thereat, the plaintiff could, nevertheless, by the exercise of ordinary care and prudence, such as persons usually exercise under similar circumstances, have avoided the accident and placed himself in a safe position. And if you find from the evidence that there was sufficient time and opportunity after said train had passed its usual stopping place, if you find there was a usual stopping place, without stopping there, for the plaintiff to have, in the exercise of ordinary care and

caution, avoided the danger, then, in that event, you must find for the defendant and against the plaintiff, unless you further find that, notwithstanding the contributory negligence of the plaintiff, the defendant, knowing of the danger, could, by the exercise of ordinary care and caution, have avoided the injury." This instruction attempts to fix a liability upon the defendant if its engineer knew that plaintiff was upon the platform of the motor. It puts the case in the alternative, "the platform, or the steps," and so makes the engineer's knowledge that he was upon the platform merely, a constituent part of the negligence charged against the defendant. The testimony is clear that the engineer knew that plaintiff was somewhere on or about the platform, and the instruction being without qualification as to the engineer's knowledge of his dangerous position there, was certainly misleading. The evidence is that he might have occupied such position on the platform, that he would have been safe from harm, or at least would not have suffered the injury of which he complains. It was not because he was upon the platform, but because a part of his person projected beyond the edge of the platform and the side of the motor, that he came in contact with the embankment and was hurt. The engineer, in order to be chargeable with want of care to avoid the accident, must have known something more than that plaintiff was either on the platform or on the steps; he must have known, or his position must have been such that he ought to have known, that plaintiff was so situated that if the train proceeded he was in danger of injury. It is true that the jury are instructed that, notwithstanding the contributory negligence of the plaintiff, he is entitled to a verdict, if the defendant, knowing of the danger, could, by the exercise of ordinary care and caution, have avoided the injury, but the term "danger" as used in the instruction is without meaning, unless it consisted in the mere fact of being upon the platform or the steps. The other instructions refer to plaintiff's danger in a similar general way. Taking these instructions together, their effect is confusing, there is no dis-

inction made between the *fact* of plaintiff's occupancy of the platform, and the *manner* of such occupancy, so that the jury may have concluded that the engineer's knowledge that he was upon the platform, without more, would, in connection with the other facts proven, authorize their verdict. Whether a state of facts existed which created a liability against the defendant, independently of any contributory negligence of which plaintiff might have been guilty, should have been submitted to the jury definitely and clearly, so that they could have intelligently considered and weighed the evidence bearing upon the question. For the reason that this was not done, the judgment must be reversed.

Reversed.

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THE CHICAGO R. I. & P. RY. CO., PLAINTIFF IN ERROR,
v. FERGUSON, DEFENDANT IN ERROR.

THE CHICAGO R. I. & P. RY. CO., PLAINTIFF IN ERROR,
v. CAMPBELL, DEFENDANT IN ERROR.

THE CHICAGO R. I. & P. RY. CO., PLAINTIFF IN ERROR,
v. WALSH, DEFENDANT IN ERROR.

1. MASTER AND SERVANT, WHEN RELATION IS NOT CREATED.

Where the principal, using due care in the selection of the person, enters into a contract with the person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, the contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, his agents or servants in the performance of the work.

2. EMPLOYMENT, WHEN INDEPENDENT.

An employment is regarded as independent when the person renders service in the course of an occupation representing the will of an employer only as to the result of the work, and not as to the means by which it is accomplished.

8. INSTRUCTIONS.

Instructions which assume the existence of a fact in question are erroneous.

Error to the County Court of El Paso County.

Messrs. PATTISON, EDSALL & WHITTED, for plaintiff in error.

Mr. T. A. McMORRIS, for defendant in error.

REED, J., delivered the opinion of the court.

The three cases embrace the same questions and issues, and were by stipulation of counsel submitted upon the same briefs and arguments of counsel. The suits were in the nature of trespass to real property, for the breaking or cutting of fences, entry upon the lands of the respective plaintiffs (defendants in error), and alleged damages; were originally brought before a justice of the peace, trials had resulting in each instance in a small judgment against plaintiff in error. Appeals were taken to the county court, trials had to a jury, verdict and judgment in each against plaintiff, and appeals taken to this court.

Plaintiff is a corporation operating a railway. By an act of 1874, Gen'l Stat., sec. 2796, page 811, it was provided that every railroad corporation operating lines of road within the state should, each year, plow fire guards on each side of its line. In compliance with the requirements of the statute, in the year 1891, the plaintiff, by contract, let the plowing of the fire guards, from some point in El Paso county to the eastern line of the state, to one Webb at a given price per mile, the work to be done in accordance with the statutory specifications. A part of the distance the land or right of way of the plaintiff was of sufficient width to allow the plowing to be done within its limits. A part of the way, if plowed at all, it had to be upon the land of abutting owners. Defendants were such owners, upon whose lands it

was necessary to enter. It is in evidence, and undisputed, that where entry upon other land was necessary, Webb was, by virtue of his contract, required to see the owners of the land and obtain permission to enter and do the work. It is also in evidence, that in the cases under review, he disregarded the requirement, and without having obtained consent cut the fences, made the entries, did the work, causing some slight damage aside from that of cutting the fences. It is also established by the evidence that plaintiff exercised no supervision or control over the work after letting the contract, its only duties being to see that the work was properly done and make the payment. It was assumed upon the trials that this state of facts created the relation of master and servant; that plaintiff was liable for the torts of the contractor. The court, in its instructions, assumed the same position, and practically and in effect took from the jury all questions of fact except those of entry and damages.

The only question necessary to be determined is whether, under the facts, a case was made where the doctrine of *respondeat superior* could be invoked and applied. The work contracted to be done was not only legal, but was required by the statute and obligatory upon the corporation. By the contract, the entry upon the land of others was to be legal under the consent of the owner—to be obtained by Webb previous to the entry.

Admitting that the relation of master and servant existed, as contended, it is very doubtful whether the corporation could be held responsible for the torts of the servant under the circumstances. The weight of authority, both English and American, is against it, but we do not find it necessary to decide the question in this case. In *Mechem on Agency*, § 747, the rule of law deduced from the authorities and lawfully stated is: "Where, however, the principal has not this right of control a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no power or right to direct or control that manner. If, therefore, the principal,

using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent where the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."

In *Forsyth v. Hooper*, 11 Allen (Mass.), 421,—a well considered case—it is said: "When, however, the person employed is engaged under an entire contract, for a gross sum, and in an independent operation, not subject to the direction or control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase to be that of contractor and contractee; and the negligence of such contracting party, or of his servant, cannot be charged upon him for whom the work is contracted to be done. The question whether the relation be that of master and servant or not, is mainly determined by ascertaining from the contract of employment *whether* the employer retains the power of directing and controlling the work, or has given it to the contractor."

In *Hilliard v. Richardson*, 3 Gray (Mass.), 349, the court, in speaking of the tort, said: "It was not done by one whom the defendant had the right to command, over whose conduct he had efficient control, whose operations he might direct, whose negligence he might restrain."

In *Fuller v. Bank of Galion*, 15 Fed. Rep. 875 (U. S. C. C. N. Dist. of Ohio), the court said: "If you find from the proof that the defendant let the whole work of excavating

and finishing the vault to Tamlyn, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work, or the place where it was being constructed, or the mode of its execution, or the workmen to be employed to do it, then he would be an independent contractor, and the defendant is not liable."

In *Blake v. Ferris*, 5 N. Y. 48, the court says: "When a man is employed in doing a job or piece of work, with his own means and his own men, and employs others to help him, or to execute the work for him and under his control, he is their superior, who is responsible for their conduct, no matter whom he is doing the work for. To attempt to make the primary principal or employer responsible, in such cases, would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded."

In a recent case, *Hexamer v. Webb*, 101 N. Y. 383, the court said: "In the case considered, we think that, by the contract between the defendant and Burford, the relation of master and servant was not created. Burford was a mechanic, engaged in a particular kind of business which qualified him for the performance of the work which he was employed to do. By the arrangement with the defendant he was an independent contractor, engaged to perform the work in question. He was employed to accomplish a particular object by obviating the difficulty which he sought to remove. The mode and manner in which it was to be done, and the means to be employed in its accomplishment, were left entirely to his skill and judgment. Everything connected with the work was wholly under his direction and control. No right was reserved to the defendant to interfere with Burford, or the conduct of the work. It was the result which was to be attained that was provided for by the contract, without any particular method or means by which it was to be accomplished. So long as the contractor did the work the defendant had no right to interfere with his way of doing it." See also, *Steel v. Railway Co.*, 16 C. Bench,

550; *Cuff v. Railway Co. et al.*, 35 N. J. L. 17; *Painter v. Pittsburgh*, 46 Pa. St. 213; *Eaton v. Railway Co.*, 59 Me. 520; *Clark v. Railway Co.*, 28 Vt. 103; *Blake v. Ferris*, 5 N. Y. 48.

It follows that the court erred in the law of the case, and that the instructions were erroneous. The instructions assume the only question, or first important question, to be determined, viz.: That the relation of master and servant existed. The court said: "If the jury believes, from the preponderance of the evidence, that the defendant's servants or employees cut the fences," etc.

The judgments will be reversed and the causes remanded.

Reversed.

FETTA, APPELLANT, v. VANDEVIER, APPELLEE.

1. PRACTICE.

When an administrator asserts a claim which in anywise tends to diminish the estate, he should procure the appointment of a representative of his trust.

2. EQUITY—DEED—MORTGAGE.

The power of a court of equity to hold as a mortgage an instrument which is in form an absolute deed, is well settled.

3. SAME—QUANTUM OF PROOF.

The rule is inflexible that, in order to take the case out of the statute of frauds, it is essential that the contract should be established by clear, definite and conclusive proofs.

4. WITNESSES.

Generally, a party to an action is incompetent to testify of his own motion, or in his own behalf, when any person appears and defends as heir.

5. WAIVER, NONE BY INFANT.

In a suit where a minor is concerned, nothing can be admitted against his interest. His representative should insist that no step be taken which shall be in any manner legitimately the subject of objection.

6. PRACTICE.

Where the guardian hesitates or fails in the performance of his duty, the court will defend the minor's rights. Appellate courts are not relieved from the general duty laid on all other tribunals to conserve the interests of minors submitted to their consideration.

3	419
4	371
4	461
20c	309
3	419
11	117
11	217
3	419
27s	539
3	419
38s	173

7. EVIDENCE.

A creditor of an estate who has intervened in an action by the administrator against the heir, and who is interested in the success of the latter, has a right to object to testimony by the plaintiff in his own behalf.

Appeal from the District Court of Arapahoe County.

Messrs. MARKHAM & CARR and Mr. G. M. ALLEN, for appellant.

Messrs. SULLIVAN & MAY, for appellee.

BISSELL, P. J., delivered the opinion of the court.

In 1889, Harvey Rarick died seized of certain property in the city of Denver, leaving as his heir at law Lilah Rarick, a minor, who lived at the time of the several matters herein stated in the state of Ohio. Rarick obtained title the October previous to his death by purchase from Asher Norris, to whom he paid the consideration, \$1,600, by a check on his account in the German National Bank. Sometime after Rarick's death, Vandevier, who was the plaintiff in this suit, and is the appellee in this court, was on his own application appointed administrator of Rarick's estate. He qualified and took upon himself the duties of the position. In August, 1890, he started the present suit against the minor heir and Isaac Rarick, her guardian. It is only necessary to state so much of the bill, and the object of the action, as will serve to show the main features of Vandevier's claim, and the situation in which he offered himself as a witness in support of it. It was Vandevier's contention that these lots in dispute were in reality his property. He claimed that he paid to Rarick at the time of the purchase from Norris \$1,200 of the \$1,600 of the purchase money. As he says, this money was applied to the payment of the price, and the balance was advanced by Rarick on an agreement between them that the title should be taken in Rarick's name, and held until such time

as Vandevier should pay the balance, when Rarick was to reconvey the title thus held as security for the payment of this balance. He offered some proof by himself, as well as another witness, that he had paid a part of that sum—to wit: \$150—leaving only \$250 due, which he attempted to satisfy by the production of a claim against Rarick's estate for board and services rendered during Rarick's last illness. At the proper time in the course of the suit, a guardian *ad litem* was appointed for the minor, and the suit progressed in the usual way. The estate appears to have been insolvent. Mrs. Fetta, the appellant, obtained judgment against the estate for upwards of \$3,000, and she evidently was proceeding in the county court under the statute to enforce her claim. Being unable to find sufficient assets, and learning of this suit, and something of the nature of Vandevier's claim, which she contended was illegal and fraudulent, she intervened. No question arises on the record concerning the legality of her proceedings, or respecting her right to present her claim in this litigation, and to contest with Vandevier his title to this property. It will, therefore, be assumed for the purposes of this opinion, that she was a judgment creditor with a valid claim against Rarick's estate, and rightfully a party to the present action, and entitled to prosecute her claim respecting the title to such judgment as the testimony might warrant. It will be observed that there was no representative of the estate named as a defendant, other than the heir to whom the title descended, subject of course to its being divested under a proper showing by legal proceedings in favor of a creditor or other person having a superior right. Not much importance is attached to this fact, although considerable stress was laid in the argument on the circumstance that Vandevier as an individual was seeking to reduce the apparent assets of the estate in his own favor, without having in court any representative of the decedent to protect the rights of those who might be entitled to a distributive share of the property. The only person complaining, however, is a judgment creditor, who was therefore possessed of an apparently

superior claim as against the heir, and was in court defending her own rights. It is not to be assumed from this statement that the proceedings are to be taken as a precedent which may be safely followed. It must be true, that, where one who occupies a representative capacity asserts a claim which in anywise tends to diminish his intestate's assets, it will be much more in harmony with the good faith and absolute integrity which ought to characterize his acts, that he should procure the appointment of some representative of his trust to remove any possible imputation on the fairness of his proceedings. To maintain the issue resulting from the denials of the allegations of the bill by the guardian on behalf of the minor, Vandevier produced two witnesses—one, the real estate agent who drew the deed at the time of the conveyance, and the other the vendor of the property. These witnesses testified generally to statements and declarations made by Rarick and by Vandevier at the time that the transfer was made and the money paid, which in a way tended to support Vandevier's claim that he was the real purchaser, and advanced \$1,200 of the consideration money which was paid for the property. The only other evidence which was tendered on this subject was his own. He was called on his own behalf, and testified fully as to the agreement which he asserts was made between him and Rarick, prior to the time that the property was bought, and professes to give all the details of that agreement, and of the transaction which resulted in the transfer of the title from Norris to Rarick, and out of which, according to his contention, a trust resulted in his favor.

We should have little hesitation in departing from our ordinary rule, which compels us to affirm a judgment of the court below when it is rendered upon the testimony of witnesses produced at the trial, if we were compelled to take that course in order to find a ground on which to overturn this judgment. The power of a court of equity to turn an absolute deed into a mortgage, and to give it that effect in favor of one having clear equitable rights in the premises,

has been settled by a long course of adjudication. It is the declared law of this state, and the courts have always recognized it in supporting the rights of contending parties. The rule is inflexible that, in order to take the case out of the statute of frauds, it is essential that the contract should be established by clear, definite, conclusive and satisfactory proofs. *Whitsett v. Kershow et al.*, 4 Colo. 419.

When the testimony is all considered, not only that of the declarations of those parties who were present at the time of the transaction, but also that of Vandevier himself, it fails to reach the level to which all the courts agree, the proof must rise to justify a decree of this description. It is not necessary to rest the case upon this basis, and it is only stated as a suggestion to the court below with reference to what may possibly be the proof upon the subsequent hearing.

As already stated, Vandevier offered himself as a witness to prove the agreement on which he relied. It is marvelous, but true, that the guardian *ad litem* who was there to represent the infant's interest failed to object to Vandevier's testimony. With respect to his client, it was a suit against an heir concerning property to which she had an absolute title as against Vandevier, unless proof was made of an enforceable trust which would divest her title. Up to the time that Vandevier was put upon the stand, there was no shadow of the requisite evidence or of the extent of proof which courts hold must be made to justify the decree sought. The statute in this state with respect to Vandevier's competency is clear, specific and incapable of misconstruction (General Statutes § 3641). According to it, no party to an action shall be allowed to testify of his own motion, or in his own behalf, when any person appears or defends as the heir, etc., of a deceased person, except in certain specified cases. There is nothing in the present case to bring Vandevier within any exception named in the statute, and we are left with the naked case of a person who was the representative of the decedent, as an individual, suing the heir at law to recover the title which was vested in her by operation of law on the

theory of a resulting trust in his own favor, and giving the only testimony which can be fairly said to uphold the agreement in such terms as to show that a trust might, under some circumstances, have arisen in his favor. Minors are the peculiar wards of a court of chancery. In all suits where a minor is concerned, nothing can be admitted against his interests, and the one chosen to represent that interest in a litigation stands in court to insist that no steps shall be taken, no act done, no evidence produced which shall in any manner be legitimately the subject of an objection and an exception. Wherever the guardian hesitates, or fails in the performance of his duty, the court has usually been astute to defend the minor's rights. According to the record, Vandevier was permitted to testify without objection on behalf of the minor. But even in that case, it is doubtful whether the present judgment would be sustained, even though upon Vandevier's testimony, an ample, well defined, clear case of resulting trust was established as against the minor, and the decree might in consequence be supported. It is exceedingly doubtful whether it would not be the duty of this court in a case like the present *sua sponte* to insist that, in considering the case, Vandevier's testimony should be entirely excluded from its consideration. It is impossible that there should be a waiver on behalf of the infant, and it is doubtful whether the decree would give a good title as against the minor when she became of age, should she see fit to disaffirm the proceeding. Appellate courts are not relieved from the general duty laid on all tribunals to conserve the interests of minors in matters submitted to their consideration.

We need not go this far. When Vandevier was put on the stand, and asked to testify concerning the agreement, the intervenor promptly and in apt form interposed a sufficient objection to his testifying. The objection was overruled, and the question thereby presented has been properly saved in the record. The court below held that the intervenor was without right to raise this question. We cannot agree. As has been heretofore stated, according to the record, the

intervenor was properly in the suit and rightfully litigating with Vandevier his claims concerning the title to the property. The heir was a necessary and indispensable party, present and represented before the court, and there was no distinct and independent issue as between Vandevier and Mrs. Fetta which they could litigate without the heir's presence. Since the intervenor was properly in the court and rightfully asserting a claim to the property, and Vandevier was without right to prosecute his suit without the heir, it necessarily follows that the suit is one fully and fairly within the scope of that provision of the statute already cited. By its terms, Vandevier was not competent to testify, and the decree must be supported, if at all, without any reference to or consideration of his testimony, as it was error for the court to admit it. The judgment could not be supported without it. It was not legitimately given, and the error is fatal to the judgment.

For the error committed by the court in admitting Vandevier to testify on his own behalf, this judgment must be reversed and remanded for further proceedings in conformity with this opinion.

Reversed.

THE PEOPLE EX REL. VANDEVIER, PLAINTIFF IN ERROR,
v. THE COUNTY COURT OF ARAPAHOE COUNTY, DEFENDANT IN ERROR.

3	425
11	150
8	425
18	26
18	27

JURISDICTION OF COUNTY COURT.

1. County courts possess jurisdiction concurrent with the district court in all cases of which they may legitimately take cognizance, and the power to regulate and control the settlement of estates of deceased persons is expressly conferred upon them.

2. SAME.

The county court has jurisdiction to order an administrator to bring into court funds in his hands belonging to the estate.

3. CERTIORARI.

Certiorari does not lie to the county court touching a matter within its jurisdiction.

Error to the District Court of Arapahoe County.

Messrs. SULLIVAN & MAY, for plaintiff in error.

Mr. V. D. MARKHAM and Mr. G. M. ALLEN, for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

This proceeding was started by an application for a writ of certiorari to be directed to the county court of Arapahoe county. It appeared from the petition that John Vandevier had been appointed administrator of the estate of Harvey Rarick, and was engaged in winding up the estate. In the course of this administration, a controversy had arisen between the administrator and Martha Fetta, a creditor, concerning the allowance and payment of her claim. According to the allegations of the petition, the creditor had taken steps in respect to the enforcement of a judgment, and her proceedings resulted in an order by the county court, made after a hearing, that Vandevier bring into court a certain sum of money alleged to be in his hands. There was no judgment in the county court in any way concerning this matter, and what the petitioner sought to restrain or reverse by this proceeding was this order that he pay the money into court, contending that the court was without jurisdiction to make any such order. The alternative writ was issued and served, and an answer was filed to which a demurrer was interposed. On the final hearing the writ was dismissed. From this judgment, which practically determined that Vandevier was without right to prosecute the proceeding, error is brought. So far as need be considered, the answer of the county judge practically set up that the administrator had been guilty of gross mismanagement, and particular acts of maladministra-

tion were set up at length. As an illustration, it was set out that the representative had colluded with sundry parties, paid claims which were not legitimate charges on the estate, and paid money without any order or allowance by the county court in the ordinary course of his administration.

The question principally discussed by counsel, and on the determination of which this decision will be rested, concerns the power of the county court as a court of probate, under circumstances like these, to order a representative, who is wasting the assets of his testator or intestate to turn over the funds in his hands until his affairs can be investigated, or until such time as he may be removed and his successor appointed. Some question was made as to the necessity of a showing that the right of appeal or other review was not possible under the statute, but this will be left wholly unconsidered. There is a broad distinction between the rights of a representative of a decedent under the statute regulating the administration of estates, and those which he possessed under the general law as it existed prior to this enactment. It was undoubtedly true at the common law that the executor or the administrator had the right to dispose of the personal assets which came into his possession according to his judgment of the rights of the parties, subject only to such proceedings for an accounting as might be proper in case it was asserted that he had not proceeded according to law. While this rule prevailed, and during the time that administrations were controlled by the ecclesiastical courts, courts of equity took jurisdiction whenever a bill was filed by one showing an interest in an estate, providing there were abundant and sufficient allegations to show that the complainants had rights and interests which were being jeopardized by conduct which was illegal and likely to be destructive to the rights of the litigant. For this reason the early English reports, and those containing the decisions of the chancery courts of this country in its early days, are full of cases in which the power and the duty of a court of equity to make an order that the funds be paid into court, whenever there was an admission of as-

sets by the representative, are fully recognized and adjudicated. Williams on Executors (6 Am. ed.), vol. 3, 2043-2047; Daniell's Chancery Practice (4 Am. ed.), chap. 40, vol. 2, 1771; *McKim v. Thompson*, 1 Bland's Chancery, 150; *Clarkson v. De Peyster*, Hopkins Chancery Reports, 572.

That this power belongs to the courts of our state which have the right to exercise chancery jurisdiction in cases which may be brought to them, and that it is not taken away by the statute regulating administrations, ought to be very clear. County courts of this state are by the terms of the constitution and the statute given concurrent jurisdiction with the district court in all cases of which they may legitimately take cognizance, and the right and power to regulate and control the settlement of the estates of deceased persons is expressly conferred upon them by statute. Under these circumstances, it may well be held that those courts possess the power, which they may exercise under proper circumstances, to order the representative to bring funds into court and abide any further order respecting the settlement of the estate. It is evident that the district court, if it could properly take cognizance of the administration of an estate, being a court with full chancery jurisdiction, has the right, according to the ancient practice and the well settled law, to make all those orders which in former times were made as a matter of course by courts having equity jurisdiction. The fact that ordinarily courts of equity assumed the right to make these orders, and made them so that it might not be possible for the ecclesiastical tribunal, with which they somewhat conflicted, to remove the fund beyond the control of an ultimate decree, does not destroy the further reason, which would be to-day operative, that the real purpose of the order and the object to be accomplished was the preservation of the fund and the estate for the benefit of him or those who might show themselves entitled to it. The latter reason is of as much force in modern times as it was under the ancient practice. And it would undoubtedly be held that the district court had full power and authority to make such an order on a proper show-

ing and under proper circumstances. Since the county court with respect to matters within its jurisdiction has authority concurrent and coextensive with the district court, there inheres in it as a necessary sequence the same power to make an order of this description.

Aside from this consideration, it must be adjudged that the power is necessarily incidental to the exercise of the very full control which the statute gives it to wind up the estates of deceased persons. According to it, the administrator is without personal authority by virtue of his appointment to pay debts, distribute assets or in anywise enforce or determine the form, manner, or extent of payments or distributive shares, or in general to control and fix the proper disposition of the funds which may come into his possession. These matters are bound to be presented to the court for allowance, settlement and adjudication, and until an order be made in the premises, except in a few minor cases designated by the statute, he is without power to disburse any part of what may come into his possession as a representative. The court is charged with the duty, speaking in a definitive rather than an exact way, of marshaling the assets, determining the classes into which the debts shall be arranged, the order in which they shall be paid, the amount of the dividends properly applicable to each class, and in general with the supervision of the representative's proceedings. This being true, it must be a power incidental to the execution of this jurisdiction to order funds to be brought into court and held for further action, in order that in a proper case the estate may be conserved, and the rights of interested parties conserved and protected. It might often happen that, if the persons concerned were compelled to await the result of an application for the removal of a representative and a hearing on an issue properly made, and a suit upon a bond which might to the knowledge of the court at the very time be absolutely worthless, they would practically be remediless, and the estate would be lost and dissipated, awaiting a final determination of the proceedings which they had instituted. To avoid these

possible difficulties and dangers, and in discharge of the plenary powers which the statute confers upon the court over estates, it must be held that this court, like all others having full jurisdiction over the subject-matter, has the right and authority to preserve the corpus of an estate for the purposes of final distribution and settlement.

These considerations justified the court in rendering judgment against the petitioner on his application for the writ, and it will accordingly be affirmed.

Affirmed.



McCLELLAN, APPELLANT, v. HURDLE ET AL., APPELLEES.

1. INSTRUCTIONS.

An instruction should not be given when there are no facts in evidence upon which it can be based.

2. ERROR, WHEN IMMATERIAL.

Although an instruction ought not to have been given, yet when it appears from the verdict that it occasioned no injury, it will be regarded as harmless error.

3. PRACTICE.

It is not error to refuse instructions requested, when their substance has been given in others.

4. WATER RIGHTS.

It is an invasion of the rights of a prior appropriator to divert water from a stream—surface or subterranean—by means of dams, wells or pumps, whereby the flow of water is diminished, notwithstanding such diversion is by the owner of land through which such water flows or percolates, and upon his own premises.

Appeal from the District Court of Weld County.

APPELLANT was the owner of, or in the legal possession of, 400 acres of land in Weld county. In July, 1886, he filed the necessary papers to secure his right, and subsequently excavated and constructed a ditch from Lone Tree creek to irrigate his land. The description of the stream or water course from which water was taken is given in the complaint

3	430
7	290
3	430
25c	82
3	430
20c	328
3	430
119	386
3	430
358	109

as follows: “ (2) That the said Lone Tree creek is a natural stream taking its rise near Granite Pass, in the state of Wyoming, and flows southeasterly through Weld county, Colorado, and empties into the Cache La Poudre river. That said Lone Tree creek has its rise in, and is fed by, melting snows, seepage, surface and subterranean drainage. That the said stream, at times and places, flows above the ground, in an open channel, and, at other times and places, below the surface, as a subterranean current. The surface water and underflow of said stream are connected and coexist. That at certain times of the year the surface flow prevails throughout the whole course of the said stream, which is at all times plainly marked; the course being indicated by a channel consisting of banks and sides, and by rank vegetation in places, indicating the place and presence of the subterranean channel.” It is also alleged that appellant’s rights and appropriation of the water were prior to any rights of appellees, who were owners and occupants of land lying above that of appellant on the same stream. The injuries complained of are stated as follows: “ That about the month of June, 1889, said defendants sank a well, and put in an irrigation pump, at or near the northwest corner of his said lands, and at or near the bank of said Lone Tree creek, and put the same in operation for the irrigation of their lands, and have since continued to operate the same. That defendants have taken and drawn off the underflow of water in said creek by means of said pump, thereby depreciating the flow of water in said creek at the point where plaintiff’s head gate is located, and diminishing the supply of water to which he is entitled, and has heretofore appropriated. That defendants have since that date further diverted the flow of water of Lone Tree creek to their own advantage, and the damage of plaintiff, by placing dams in the channel above plaintiff’s head gate thereof, and turning the waters of said stream into their well, and into ditches constructed by themselves and others aforesaid, and using the same upon their said lands. That by reason of said acts and doings of defendants in diverting the

said subterranean and surface flow of said stream to their own use, and in denial of the rights of plaintiff, plaintiff is damaged in the sum of five thousand dollars. (5) That the said defendants have since said last mentioned date hitherto maintained, and still do maintain, said well, dams, and ditches, and pumping arrangements, for the diversion of the waters flowing in said Lone Tree creek, and threaten, during the irrigating season of 1891, to continue the diversion and use of said waters. That, as plaintiff is credibly informed and believes, the defendants are now engaged in sinking wells to reach said subterranean channel, and putting other pumps therein, and on the said described lands, for the avowed purpose of drawing off and diverting the waters of said stream to their own use, which, if done and consummated, will result in the further injury and damage to this plaintiff." Then prays that his appropriation of water, to the extent appropriated, be declared prior to that of appellees, and asking for an injunction restraining the pumping, use, and application of the water by appellees. By the answer it is denied that Lone Tree creek, or any portion of it, "flows beneath the ground as a subterranean stream, and is connected with its surface flowage, and that they coexist." Admits the sinking of the well, and the use of an irrigation pump to raise the water for purposes of irrigation. "Denies that defendants have taken and drawn off the underflow, as alleged in said complaint, or in any way interfered with the flow of said stream, by means of said well and pump, or otherwise, so as to depreciate the flow of water in said creek at the point where plaintiff's head gate is located, and to which he is entitled. Denies that defendants have since said date further diverted the flow of water of Lone Tree creek to their own use and advantage, and to the damage of plaintiff, by placing dams in the channel thereof, and turning the water of said stream into their said well, and into ditches constructed by themselves or others." A jury was had to try the issues presented, which was given the following instructions: "(2) The court instructs the jury that if you find, from the evidence,

defendants constructed a dam across Lone Tree creek, and you further find that the plaintiff was not damaged thereby, you cannot find damages in favor of plaintiff against the defendants for that cause. (3) The court instructs the jury, as a matter of law, that water that percolates through the soil, without an evident and well known channel, is regarded as a part of the land, and belongs to the owner thereof, and he may make such use of the water as he sees fit while it remains on or under his land. (4) The jury are instructed that digging wells close to a stream, so that the waters of the stream necessarily percolate into such wells, thus diminishing the water previously appropriated, is but doing indirectly what the law forbids being done directly, and will not be allowed. And if the jury believe from the evidence that defendants have by such means drawn from Lone Tree creek water previously appropriated by plaintiff, they will assess his damages upon this branch of the case in such amount as he has been shown to have suffered." The verdict was for the defendants, (the appellees.) Judgment upon the verdict, from which an appeal was taken to this court.

Mr. JAMES W. MCCREERY, for appellant.

Messrs. A. C. PATTON and H. E. CHURCHILL, for appellees.

REED, J., after stating the facts, delivered the opinion of the court.

The case is one of peculiar interest, and involves questions that have never been fully determined in this state. The attempted denials in the answer of the allegations in the complaint are inartificially drawn, and some of them are clearly open to the criticism of being "negatives pregnant;" but the attempt and intention of the pleader to make them denials is apparent. Consequently, at this stage of the proceeding, it would probably be wiser to treat them according to the in-

tention of the pleader than to apply strictly technical rules of pleading. The court below evidently regarded them as denials, tendering issues of fact. I cannot, as urged in argument by the learned counsel of appellant, regard the question of damages as the sole question of fact submitted to the jury. Although it was an equity case, it clearly appears from the instructions of the court, and the acceptance of a general verdict, that all issues of fact made by the pleadings were submitted to the jury for its determination. The prior appropriation of the water of Lone Tree creek to the extent claimed, the construction of the ditch, and the application of the water to his land, appear to have been conceded. If not conceded, they were fully established by the evidence. Hence the first, fundamental and important question to be found by the jury was whether appellant's rights were invaded, and the volume of water to which he was entitled by priority of appropriation had been diminished by the acts of appellees. The court instructed the jury "that water that percolates through the soil without an evident and well-known channel is regarded as part of the land, and belongs to the owner thereof, and he may make such use of the water as he sees fit, while it remains on, in, or under his land." It is probably safe to say that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by an obvious surface channel. If by any of these natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a property in it which cannot be divested by the wrongful diversion by another, nor can there be any substantial diminution. To hold otherwise would be to concede to superior owners of land the right to all sources of supply that go to create a stream, regardless of the rights of those who previously acquired the right to the use of the water from the stream below. Strictly and technically, the instruction should not have been given. There were no facts in evidence upon which it could be properly based. But, in view of the fact that nearly all the evidence was directed to the question

of whether the water supply was diminished by the acts of the defendants, the finding by the jury that it was not, renders the instruction harmless. The other instruction (No. 4) given by the court appears to embrace, and clearly state, all the law of the case. The refusal of the court to give the instructions prayed by the plaintiff cannot be regarded as error. All that should have been given were, in substance, given by the court.

Streams of the character described in the complaint are frequent throughout the entire arid portion of the continent, and their existence and peculiarities cannot be ignored, being well-defined surface streams with well-defined channels, for long distances, then, for miles, sunken, until uniting with another stream, but having, topographically, all the physical characteristics of a stream,—a bed, banks, valley, etc., at times of high water, being, its entire length, a running surface stream, and, in low water, or droughts, running short distances, standing in pools, sinking into gravel or loose material in its bed, percolating through or passing under it, and reappearing at some point below, but still delivering at different points a greater or less volume of water,—sometimes at the surface, sometimes much below. It is not necessary to legally define water courses having these peculiar characteristics. They are, as conduits of water, such source of supply as to furnish an appropriator a legal basis for the appropriation of the available water. In the case of a running surface stream the question of appropriation is easy of solution; but not so in a sunken stream, particularly at a point where the water is an indefinite distance below the surface. Under such circumstances it becomes at once apparent that to appropriate and utilize the water an impervious dam must be constructed, and carried down to an impervious base, to stop and retain the subterranean water, and raise it to the ditch. Whenever such adequate provision is made, any act diminishing the quantity that would naturally reach the dam, and add to the supply, up to the limit of the appropriation,—whether by diversion upon the surface, the sinking of wells

and using pumps, or otherwise,—would be actionable. The trouble in the case was in the want of proof. It was in evidence that appellant had constructed a dam across the stream to supply his ditch, but there is nothing in regard to the character of the dam. It may have been only a surface dam, which, although sufficient for running surface water, may have been wholly inadequate for retaining and utilizing the water at any depth below the surface. The efficiency of the dam to stop, retain, and apply the sunken water should have been shown; for if the water found and taken by the appellees, by sinking wells and pumping, would, in its natural course, have passed under the dam, the available supply could not have been materially diminished. It should also have been shown that the water taken by appellees was intercepted, and would, by the laws of gravity, following the natural plain of drainage, have reached appellant's premises. The testimony was conflicting, vague, and indefinite, based upon the casual observation of different individuals at different times and perhaps under very varying natural conditions. Opinions were substituted to establish physical facts that could have been established by actual tests and practical demonstration. The appellant did not, by proper and competent testimony, make a case entitling him to an injunction restraining the pumping by appellees, and such relief was properly refused. It was shown that appellees had formerly constructed a dam, intercepted surface water, and turned it into their ditch. If such obstruction and diversion had not been abated, and appellant's available supply of water was by such acts diminished, and less than his appropriation, appellees should have been restrained from such interference. The evidence being so vague, conflicting, and indefinite, the verdict of the jury must be sustained, and the decree of the court based upon it,

Affirmed.

CUSHMAN ET AL., APPELLANTS, v. THE HIGHLAND DITCH
COMPANY, APPELLEE.

1. WATER RIGHTS.

Prior appropriators of water are entitled to have the same flow unimpaired in quantity and without permanent or unreasonable deterioration in quality.

2. PRACTICE.

A judgment denying an injunction and dismissing the action, which was brought to restrain the commission of acts in anticipation of the consequence thereof being permanently injurious, is affirmed in this case, without prejudice to another suit when the actual result of the proceeding complained of is susceptible of proof, and can be shown to be permanently injurious and wrongful.

Appeal from the District Court of Boulder County.

Messrs. MINOR and STOCKTON and Mr. J. H. RANDALL, for appellants.

Mr. B. L. CARR and Mr. F. P. SECOR, for appellee.

BISSELL, P. J., delivered the opinion of the court.

The parties to this suit were on one side the owners and occupants of lands along the line of St. Vrain creek, and on the other a corporation called the Highland Ditch Company, which was a distributor of water to its stockholders. The plaintiffs and appellants were old settlers along the line of the stream, and had very ancient and early rights to the water, which they had diverted by their ditches and appropriated by application to their lands. The Ditch Company seems to have been organized by later settlers farther down the stream, who were not always able, with due regard to the early appropriators' rights, to obtain what was necessary for the irrigation of their lands. To remedy this difficulty in a measure the corporation constructed a reservoir at a point above where the plaintiffs' ditches take their water from the

stream, and in a natural basin, which in the early times was called the McIntosh lake. This was an ancient slough known to the residents of that section in the very early 60's as an alkali slough. According to the description given of it by the witnesses, in the rainy season it contained considerable water, but towards the latter part of the summer it was nearly dry, and its surface became apparently one white mass of alkali. In the execution of their plans, the Highland Ditch Company built a dam across the lower part of the lake, and thereby flooded two or three hundred acres of land, and were able to put into the lake water to a depth of ten or fifteen feet. The opportunity to get this water was furnished by a contract which they had with another ditch company, and was apparently exercised at that season of the year, when waters were high and unused by other appropriators. After the dam was built, the company started to construct a drain ditch from the reservoir down to St. Vrain creek for the purpose of drawing off all the water in the lake, or substantially all of it after it should have been filled, to flush it and purify it by the removal of the alkalies, which would necessarily be absorbed and held in solution by the body of water with which the lake was filled. The plaintiffs filed their bill on the theory that the turning of this vast body of alkali water into the St. Vrain creek, which was the declared purpose of the Ditch Company, would so pollute the waters of the St. Vrain as to render them unfit for irrigation or domestic purposes. It will be observed that the water had never been turned into the creek, and that the ditch had not been constructed at the time the bill was filed. To sustain their action, the plaintiffs showed by chemical and professional testimony, as well as by the testimony of farmers, that the waters of the lake were impure, and held (according to some of the witnesses) nearly two hundred grains of solid alkaline matter to the gallon, when thirty-five is the limit consistent with safety. They also offered proof concerning the digging of the ditch through the lower end of the slough, and the consequent appearance of alkali wherever the land was disturbed, and considerable

proof showing that the whole country was thoroughly impregnated with these foreign and deleterious substances. On the other hand, there was evidence which tended to show that the flushing of the lake would purify the water and do no permanent harm to other appropriators, and that the storage would be a very great benefit to the stockholders of the ditch, and bring a large quantity of land under cultivation. On the hearing, the interlocutory injunction which had been granted was dissolved and a decree entered dismissing the bill. Under the well established rule governing appellate procedure, the judgment must be affirmed. There is no question that riparian owners and these prior appropriators of water are entitled to have the St. Vrain creek flow unimpaired in quantity, and unpolluted in any permanent and unreasonable way. The law which entitles parties to preserve the purity of the streams, whose waters are theirs by purchase or by appropriation, is so thoroughly well settled that it can only be assumed the court found upon the evidence there was no proof which would establish a probable permanent injury to the complainants. It is quite true that the record furnishes a very strong basis for the opinion that the result may be otherwise. If the present judgment was conclusive of the question and resulted in the permanent settlement of it against the rights of the complainants, this court might be disposed to review the case, and send it back for another hearing. We are always reluctant to disturb the findings of a lower court as to questions of fact, and do not concede this to be a case where necessity requires a departure from the ordinary rule. Before this time, the drain ditch has been constructed, the reservoir has undoubtedly been flushed, and it is a matter probably susceptible of proof to the satisfaction of a jury and of the court, as to what the actual result of the proceeding is. The parties undoubtedly have the right to bring what was formerly an action on the case to recover damages, or a right to file a bill and restrain the company from using the reservoir, if they are able to

satisfy the court that it is of a permanently injurious and wrongful character.

Since this is true, the judgment dismissing the bill will be affirmed, with costs, but without prejudice to the right of appellants to bring such action at law or file such bill in equity as they may be advised.

Affirmed.

SEPTEMBER TERM, 1898.

KEYS, PLAINTIFF IN ERROR, v. MORRISON ET AL., DEFENDANTS IN ERROR.

1. INTEREST—STATUTORY CONSTRUCTION.

Interest is recoverable only in those cases specified in the statute.

Mere delay to pay is not necessarily "unreasonable and vexatious delay," within the meaning of the statute.

2. PLEADING.

A general allegation of delay, even though it be averred to have been vexatious and unreasonable, would be insufficient if challenged in apt time by demurrer or motion; but such an allegation is not so totally defective that proof could not be introduced thereunder, and is sufficient to support a judgment for interest.

3. PRACTICE—WAIVER OF OBJECTIONS.

Objection on the ground of misjoinder of causes of action must be taken advantage of by demurrer if the defect be apparent on the face of the complaint, and by answer, if not so apparent; otherwise it is deemed waived.

Error to the District Court of Arapahoe County.

Messrs. BROWNE, PUTNAM & PRESTON, for plaintiff in error.

Messrs. BENEDICT & PHELPS, for defendants in error.

BISSELL, P. J., delivered the opinion of the court.

In 1890, Morrison, Bingham & Co. brought suit against Keys on several different causes of action. The plaintiffs counted upon several promissory notes, on an account for goods sold and delivered to Keys and another as co-partners, and also on an account against Keys, Hinkle & Keys for a specified sum. The complaint claimed interest on the sums named in the second two causes of action because the money had been withheld in a manner which was

the legal equivalent of the "unreasonable and vexatious delay" specified in the statute giving the right to interest in certain cases. The summons was served, the defendant made default, and judgment was entered for the amount claimed, with interest. Keys sued out a writ of error to reverse the judgment, and brought up simply a transcript of the record, which contains a copy of the complaint, the summons and the orders and judgment entered. He assigns various errors, but discusses only two, and these will be all which will be either discussed or considered in determining the case.

He seems seriously to contend that the judgment is erroneous because the court entered judgment for the interest which the plaintiffs asked under their allegation that there had been an "unreasonable and vexatious delay" in the payment of the several accounts for which the suit was brought. In support of this contention he cites the cases of *Hawley v. Barker*, 5 Colo. 118, and *Corson v. Neatheny*, 9 Colo. 212, which undoubtedly hold that interest is only recoverable in those cases which are specified in the statute, and that mere delay to pay is not necessarily the "unreasonable and vexatious delay" which the statute requires in order to permit the recovery of interest. Conceding this to be true, the contention furnishes no basis for the reversal of the judgment. The complaint alleged that there had been this sort of delay in the payment of the money, and the plaintiffs prayed to recover interest on that hypothesis. It is doubtless true that a general allegation of delay, even though it be averred to be vexatious and unreasonable, is not an apt and artistic method of pleading, and the pleader on the interposition of a demurrer, or a proper motion if one would lie, might compel an exact and specific statement of the facts constituting the delay, or else object to the introduction of proof concerning it. Where, however, as in this case, there was no appearance on the part of the defendant and he took no action in the premises, it cannot be said that the pleading was so totally defective that proof could not be introduced thereunder. Since this is true, we must presume for the purposes of

upholding the judgment that the plaintiffs introduced such evidence in support of that allegation as would justify the entry of the judgment which the court gave.

The plaintiff in error likewise insists that there was a misjoinder of causes of action, and that according to the very plain allegations of the complaint it is evident that the causes did not come within the statutory provisions which authorize the union of several in the same suit. This may be true, but it is unavailable. The Code provides that a demurrer shall lie for the misjoinder of causes of action, and further enacts that advantage must be thus taken of this defect if it exists and is apparent on the face of the complaint. It likewise restricts the right to raise this question to answer if the fact be not thus apparent, and provides that in case of a failure to take advantage of the error in either one of these two ways it shall be deemed a waiver of the mistake. These several Code provisions clearly dispose of this contention. The judgment was entered after default, the defendant neither demurred to the complaint nor set up by answer that there was a misjoinder of the causes of action, and the court had the right to enter judgment notwithstanding the fact that the complaint might have been vulnerable to attack in respect of these matters.

These two errors which are presented to the consideration of the court do not require us to disturb the judgment, and it will therefore be affirmed.

Affirmed.

MOORE, APPELLANT, v. VICKERS, APPELLEE.

1. RECEIPT.

A receipt in full by the assignee of a claim for collection is not conclusive in favor of the party to whom it is given, nor against the assignor, especially when the amount claimed to be due upon the account exceeds the amount paid.

2. ASSIGNEE.

A party to whom a claim has been assigned, with authority to collect

the amount due, has no right to collect a less sum, and bind his assignor thereby, unless the release be made on his own behalf and for moneys he had a right to collect beyond those which he received.

8. REASSIGNMENT.

A party to whom a claim against another has been assigned may reassign it to his assignor, who becomes thereby invested with all his original rights to recover thereon.

4. PRACTICE—WAIVER OF OBJECTION.

An objection on the ground of misjoinder must be made in apt time in the trial court. It will not be considered if made on appeal for the first time.

Appeal from the County Court of Arapahoe County.

Mr. H. M. JACOWAY, for appellant.

Mr. GEORGE F. DUNKLEE and Mr. O. E. JACKSON, for appellee.

BISSELL, P. J., delivered the opinion of the court.

Early in 1891, Moore and Vickers, as contractor and subcontractor, entered into an agreement respecting some grading on the Denver & Suburban Railway Company. Shortly afterwards, by reason of some undisclosed transactions between one Myers and Vickers, Vickers assigned to Myers all moneys due and to become due under the contract which he had made with Moore, and authorized Myers to collect it. It appears that Vickers did a good deal of work under the contract, whereby a considerable sum became due him. In October, Myers attempted to collect from Moore all or a portion of what Vickers had earned, presenting the authority expressed in the assignment therefor. At this time, Moore appears to have raised some question concerning the amount due, but offered to pay Myers one hundred and fifty dollars if he would sign a receipt, which on its face was expressed to be in full of all moneys due Vickers under the original subcontract. Myers accepted the proposition, signed the receipt and took his money. Whether under the arrangement

between Myers and Vickers he was entitled to collect the whole sum due, or whether the amount which he received wholly, substantially or partially settled his claim, is not made evident by the record. Whatever the fact may be in respect of this matter, the receipt cannot be taken either as conclusive in favor of Moore, or as binding upon Vickers as to the amount that was due him under the contract. It has been somewhat seriously argued that this receipt should control the rights of the parties, and should bar a recovery in this suit, which was brought by Vickers for the use of Dunklee, a subsequent assignee, to recover the balance said to be due for the work done under the original convention. There are many reasons to the contrary. In the first place, Myers was not empowered by the terms of the assignment to settle or adjust any controversy between Vickers, his assignor, and Moore, the contractor. His sole authority was to collect and receive whatever might be due from the contractor to Vickers for the work done. Manifestly, this would give him no right to collect a less sum than that which had been earned and bind Vickers thereby, unless the release, if any, was made on his own behalf and for moneys which he had a right to collect beyond those which he received. What these facts may be are not disclosed, so that it cannot be adjudged that he was possessed of authority to bind Vickers by the settlement. An additional and very cogent reason to reject this contention concerning the effect of the receipt is found in the circumstances under which it was executed. Myers seems to have suggested that Vickers claimed more money than that sum, and that he was doubtful as to his right or his power to discharge the liability of the contractor by the execution of a receipt for a sum less than that which Vickers claimed. His objections were overcome by the statement of the contractor that the receipt would cut no figure, and that if Vickers had any claim for money, and could show it, he would get it in a minute. This conversation and these circumstances effectually dispose of the claim that the receipt was in any manner a conclusive and binding settlement as

to the sum due from Moore to Vickers for the work which was done.

After this transaction between Moore and Myers, the latter reassigned to Vickers the right which had passed to him by the original transfer between him and the subcontractor. The reassignment was sufficient in form and legal effect to reinvest Vickers with his original rights to recover for the work done under his agreement with Moore, and, if at that time Moore was indebted to him on account of it, he would have the right to proceed to collect. Acting on this theory, Vickers then transferred to one Dunklee his claims in the premises. The present suit grows out of that transfer. The suit was brought before a justice in the name of Vickers for the use of Dunklee, and after judgment in favor of the plaintiff, the defendant, Moore, appealed to the county court, where the case was retried, and judgment again entered for the plaintiff in the action for the sum of \$194.67. It is unnecessary to state the nature or the history of the plaintiff's claim, or the evidence which entitled him to recover. It need only be stated that his claim was not controverted by any evidence offered on behalf of the defendant, and the proof was ample to justify the recovery, unless there was some legal obstacle thereto. There seems to be none. The defendant moved for a nonsuit because of the failure of the proof to establish a right of action in favor of the plaintiff, and moved for a new trial on substantially the same grounds,—to wit, that the judgment was not warranted by the evidence, and that the proof offered concerning the circumstances under which the receipt was executed was incompetent and ought not to have been received. The court did not err in overruling these motions and entering judgment in favor of the plaintiff. These matters, however, are not what is principally argued in this court. The appellant here insists that the suit was improperly brought in the name of Vickers for the use of Dunklee, on the theory that the action should be brought in the name of the real party in interest, and that either Vickers or Dunklee were improperly parties to the

suit, and wrongfully joined as plaintiffs. The question is not presented to the court in such a manner as to call for a decision respecting the proper form of bringing a suit before a justice on an open account which has by assignment passed to another than the one to whom the account originally ran. We are not called upon to decide whether the suit should be brought by the assignee as the real party in interest, or whether it should be brought in the name of the original creditor, or in his name for the use of the party entitled to the proceeds, which was the course of the common law. This is a much vexed question, and one which should only be decided when the matter is fairly before the court, and when the question is raised at a time when the court below is fully empowered to correct any error in that regard, so that the suit may proceed regularly to a legitimate and proper judgment. It is not permitted to parties to litigate the actual controversy and raise no question concerning the right of the plaintiffs to sue until after judgment, and then be heard on an appeal to complain that the proper parties were not before the court. The unfairness of such a procedure would be well manifest in this case should it be reversed on these grounds. The litigation below proceeded on the sole contention that the defendant was not indebted, and judgment went against him both before the justice and in the county court, to which the cause went on appeal. He nowhere and at no time, during the progress of the litigation, until it reached this court, suggested by motion or otherwise a misjoinder of parties plaintiff. He should not now be heard to complain. If the suit ought to have been brought in the name of the original subcontractor, Vickers, it may be said that Vickers was before the court, and is concluded by his recovery. If, on the other hand, it is asserted that only Dunklee, the assignee, should sue, it is enough to say that he likewise was before the court, and is bound by the judgment entered. Thus, whatever may be the conclusion as to the proper person to sue, everybody concerned in the recovery was before the court, and is bound by the judg-

ment, and the defendant is unharmed, simply being called upon to pay the amount which he owed under his contract. This solution of the difficulty is in very close analogy to that adopted by the supreme court in *Jackson v. Hamm*, 14 Colo. 58.

Perceiving no error in the record, the judgment will be affirmed.

Affirmed.

JONES, PLAINTIFF IN ERROR, v. HENSHALL ET AL., DEFENDANTS IN ERROR.

1. EVIDENCE—BOOKS OF ACCOUNT.

Before books of account are admissible in evidence, a proper foundation must be laid for that purpose, and the books must be books of original entry and competent proof of the matters which they tend to establish.

2. WITNESS—COMPETENCY OF.

The competency of a witness is not affected by the character of the testimony he may give.

3. SAME.

In general, a party is absolutely incompetent to give evidence when he brings an action against an administrator or defends a suit brought by one.

4. PRESUMPTION OF PAYMENT.

A presumption of payment of commercial paper never arises from lapse of time unless it be equivalent to the period prescribed by the statute of limitations.

Error to the District Court of Arapahoe County.

Messrs. TELLER & ORAHOD, for plaintiff in error.

Messrs. BROWNE, PUTNAM & PRESTON, for defendants in error.

BISSELL, P. J., delivered the opinion of the court.

The administrator of the estate of Aaron M. Jones brought

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this action against the defendants in error, James Henshall and his wife, to recover the sum of three thousand dollars alleged to be due on a promissory note executed by them on the second of June, 1884, and found among the assets of the decedent. The note was payable one year after date, and had been due some five years at the time of Jones's death. There was no controversy about the note, but the defendants set up by their answer a payment during Jones's lifetime. Their first plea was a general one of payment; the second was likewise in legal effect an averment of satisfaction, and set up substantially that James Henshall and Jones were the joint owners of the stock of the Henshall Queensware Company. The assets of the company were subsequently sold to other parties for a fixed sum, which was received by Jones and applied to his own uses. It was averred that the receipt of this money by Jones and the appropriation of it amounted to a satisfaction of this three thousand dollar note, since it was in fact and legal effect an appropriation by Jones of the money which would have been coming to Henshall out of the sale of the stock of the Queensware Company.

The suit thus turned on the proof of this averred payment of the note through the transaction of the sale of the assets of the company. To support the plea the defendants offered in evidence certain pages of the ledger, which made a part of the set of books of the Queensware Company, which contained entries tending to show Jones's receipt of the consideration which the purchasers paid for the stock of the company. They also offered divers deeds of certain property which had passed between Henshall and Jones in his lifetime, at about the time of the original purchase of the queensware stock. During the progress of the trial, James Henshall offered himself as a witness and undertook to testify concerning the matters in dispute. He was allowed to give evidence touching certain matters which were relevant to the issues, and undoubtedly competent if he had the right to give evidence concerning them. As to the exact transaction out of which the note grew, he was not permitted to give testimony.

This statement is sufficiently broad to disclose the errors relied upon and the basis of this opinion. It was always true under the general rules of evidence that wherever any matter in issue was supportable by what appeared on the books of a party, those books, if they were books of original entry, could be put in evidence after a sufficient foundation had been laid for the purpose. This rule is not varied by our statute, which is in terms and in form substantially coincident with the common law rule of evidence on the subject. But under this, as at the common law, a proper foundation must be laid for the purpose, and the books themselves must be competent proof of the matters which they tend to establish. *Farrington v. Tucker et al.*, 6 Colo. 557.

Without attempting to decide whether under any circumstances the books of this company would be evidence against the estate in support of the plea of payment, it is manifest that they were inadmissible at the time that they were produced, and under the circumstances existing when they were offered. They were not books of original entry, and no foundation whatever was laid for their introduction, and it is exceedingly difficult at the best to say that they tended to support the defendant's plea. According to his own testimony, he was the owner of but one share of the stock of the company, and there was no other holder of any of the corporate evidence of title except as to one share. This would leave the entire holding to stand properly and legitimately in the name of Jones, who would necessarily have the right in case of sale to appropriate the results to his own uses. How the fact that Jones did receive these proceeds of sale tends to show that the note of three thousand dollars was paid, when there is no absolute equivalence between the value of one share and the proportionate purchase price, it is difficult to imagine. But whatever may be the proper inference on this subject, the books themselves were not proper evidence concerning that matter under the circumstances surrounding the offer.

When the defendant, Henshall, was offered as a witness

in his own behalf, the plaintiff and administrator very promptly and properly objected to his giving testimony because he was not a competent witness under the statute. The objection was overruled, and Henshall proceeded to give evidence. The testimony which he gave related to matters relevant under the issue, and tended in some measure to support his plea of payment. During the progress of his examination, he was asked about the transaction out of which the note grew,—the sale of the queensware property and the transfer by him and his wife of certain real estate to Jones antedating their original purchase of this stock of goods. As to these latter matters the court would not permit him to testify, evidently proceeding upon the hypothesis that he was competent as a witness as to all matters which did not relate to the transaction occurring directly between the decedent and the witness. As we understand the statute, the competency of a witness is not at all affected by the character of the testimony which he may give, and it is not at all dependent upon considerations of this nature. Our statute on the subject of witnesses makes all men competent to testify subject to certain limitations, and their competency is not affected by the circumstance that they happen to be parties to the suit. This broad innovation upon the common law rule is now almost universal in this country. But in this state as in most others parties are not permitted to testify, save under very exceptional conditions and circumstances, where a representative of a decedent either brings the action or defends the suit. General Statutes, § 3641.

It is needless to quote the section or state the exceptional circumstances under which a party may give evidence. In general it may be said that a party is absolutely incompetent to give evidence on any subject when he brings an action against an administrator or defends a suit brought by one. The character of his testimony and the subject-matter about which he testifies are totally unimportant. If the evidence which he gives is relevant to any issue made in the case, it is error to permit him to give it at his own instance, and if the

objection be properly interposed in apt time, it must be sustained. These errors necessitate the reversal of this judgment. The cause was tried to the court without a jury. Counsel therefore contend that, as there was sufficient competent evidence to support the judgment, this court is bound to disregard these errors on the ground that they do not affect the substantial rights of the parties. Code of 1887, § 78. Without determining whether these errors would be covered by that code provision, the contention is abundantly answered by the statement of the conclusion at which we have arrived, that there is nothing in the record which will support the judgment in the absence of this testimony. We have read the abstract carefully and have also read the evidence in the record, and we are very frank to say that we are unable to find in it such evidence of payment as justifies the judgment. It is undoubtedly a very singular circumstance that all these transactions should have happened, and this obligation thereby been liquidated and still remain in the possession of the intestate. It is of course readily responded that the obligation had remained unpaid for five years prior to Jones's death without any known attempt on his part to enforce it. This circumstance, however, can hardly be taken as sufficiently responsive to the suggestion. A presumption of payment never arises in a case of commercial paper because of the lapse of time, unless that be equivalent to what is prescribed by the statute of limitations.

Because of the errors committed by the court in respect of the matters referred to, this judgment must be reversed and remanded for a new trial.

Reversed.

SMITH ET AL., PLAINTIFFS IN ERROR, V. STARK ET AL.,
DEFENDANTS IN ERROR.

1. NOTICE BY RECORD.

The record of a mortgage upon real estate charges subsequent purchasers thereof with notice of the incumbrance.

2. SUBSEQUENT PURCHASERS—BURDEN OF PROOF.

Purchasers with notice of incumbrance are in no sense innocent, and if they desire to exempt the property from the obligation of the incumbrance by proof that the paper it was executed to secure has been liquidated, the burden is upon them to show it.

3. EVIDENCE.

The production of the note by the plaintiff at the trial, showing payment of interest months after the date of its alleged payment, is sufficient to overcome any presumption arising from the record of a satisfaction of a mortgage securing a note of like description.

Error to the District Court of Montrose County.

Mr. HUGO SELIG, for plaintiffs in error.

Mr. THOMAS J. BLACK, for defendants in error.

BISSELL, P. J., delivered the opinion of the court.

The administrators of H. E. Volkman began this suit in the district court of Montrose county to recover the amount due on a promissory note made by one Thomas E. Fenlon, and to foreclose a mortgage given on certain property to secure the payment of the paper. The note was dated on October 20, 1888, and was for \$500, due one year after date, with a specified interest. The mortgage covered certain lots in the town of Montrose. Fenlon, the mortgagor, and Smith and Heil, the plaintiffs in error, who were grantees of Fenlon subsequent to the date of the mortgage, were made parties. The only defense was by these subsequent grantees, who set up in their answer that the note which the mortgage was given to secure had been paid before the transfer to them,

and the mortgage was therefore not a security for its payment. Fenlon answered, although he failed to appear at the trial, and he defended also on the ground that the note had been paid, but principally on another ground, which will be stated, in order to make this controversy intelligible. Otherwise than for this, that particular defense will not be considered. Fenlon set up in his answer that at the time the note was made, October, 1888, he gave a mortgage on certain property in the town of Montrose, which was the same property embraced in the instrument in suit. He alleged that afterwards, in the following May, it was agreed between the parties that the mortgage should be satisfied, and he should execute a new one, which should cover property other than that named in the original instrument. He set up, of course, that there was a mistake, and that by reason of the error the mortgage erroneously covered the property which he afterwards deeded to Heil and Smith. There was no proof of these facts, but they serve to explain and make clear the theory of the plaintiffs in error and their contention before the court. As already stated, on May 8, 1889, the mortgage on which the present action was based was delivered to Volkman, who then held the note which was made in October, 1888. It was at that time unpaid, and remained unpaid at the time of his death, and was in the possession of the administrators at the time of suit, who produced it in court. The indorsements on the back of the note showed that Fenlon had paid the interest on the paper from the time it was made up to December, 1890. At the trial, Heil and Smith admitted the mortgage, its execution, delivery and record, and the administrators produced the note, which showed nothing paid other than the interest, which was satisfied on December 2, 1890, by the debtor. The grantees, Heil and Smith, then offered to prove that on May 8, 1889, in Book 3, on page 189 of the records of Montrose county, there appeared a satisfaction of the note described in the mortgage, and that in the same book, on page 205, a similar satisfaction was recorded. This evidence was admitted, but what it was appears neither in

the bill of exceptions nor anywhere in the record. It was not shown that the note was surrendered, nor that it in fact was paid, and the proof amounted to nothing more, so far as we can gather, than evidence that a note of the date, description and amount of the one sued on had been marked satisfied on the record.

The plaintiffs in error now seriously contend that under section 234 of the General Statutes of Colorado this operated as a payment of the note, and as to the subsequent grantees precludes the original mortgagee and his representatives from foreclosing their security. This statute in general provides that when payment of the amount due on a mortgage has been made, and the mortgagee shall enter satisfaction on the record therefor, the receipt shall operate as a release, and a reconveyance of the property to the mortgagor. Without construing the section or determining its legal effect, where the proof might be that a mortgage had been satisfied and the receipt indorsed on the margin of the record without more, it is enough to say that subsequently to the date of this alleged recorded satisfaction the owner of the property executed a new security—to wit, the one in suit—upon the same property to secure the payment of a note of the same description, or to secure the payment of the note described in the receipt as having been satisfied. It further appears that the note was in the possession of the deceased long after this alleged satisfaction, and the maker paid interest on it up to December, 1890, and it was produced in court by the plaintiffs at the time of the trial. These circumstances are ample to rebut any presumption of payment arising from the record, and the proof therefore cannot be held to substantiate the plea of payment put in by Heil and Smith. The new mortgage was on record prior to the time of the conveyance to them, and they were charged with notice that the property was covered by this incumbrance executed to secure either the note originally made or one like it, and of the same date and in the same terms. They were therefore in no sense innocent purchasers, and, if they desired to exempt the prop-

erty from the obligation of an evidently valid incumbrance by proof that the paper it was executed to secure had been liquidated, the burden was on them to show it. This duty which the law casts on them is not discharged by the simple production of a copy of that receipt from the record, even though in terms it amounts to a declaration of payment, although, of course, we are unadvised as to this fact, since the receipt is not in evidence and not before us. But regardless of this consideration, we are of the opinion that the production of the note at the time of the trial showing the payment of interest months after the date of the alleged receipt was sufficient to overcome any presumption arising from the record, and left the burden still on the defendants who asserted payment to show that the note had in fact been satisfied. They offered no proof on this question, and, having set up no other defence, it must be adjudged that the security is enforceable, the note still due, and that the representatives have the right to collect it.

There being no error apparent in the record, the judgment will be affirmed.

Affirmed.

BUNO, PLAINTIFF IN ERROR, v. GOMER, DEFENDANT IN ERROR.

1. APPELLATE PRACTICE.

Where there is evidence in the record to support the finding of the referee and the judgment of the court, the conclusion of the trial court will not be disturbed.

2. AMENDMENTS.

The granting of leave to amend pleadings is entirely discretionary with the trial court, and, unless that discretion has been abused, appellate courts will not interfere.

3. SAME.

Where a party desires to amend his pleadings by withdrawing a damaging admission, the application for leave to do so should be made

the instant the error is discovered, and a broad, substantial showing of mistake is essential to entitle him to relief in the premises.

Appeal from the District Court of Arapahoe County.

Mr. C. M. BICE, for plaintiff in error.

Mr. J. W. HORNER and Mr. J. E. ROBINSON, for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

A careful scrutiny of the record satisfies us that the judgment entered has equitably settled the rights of these parties. In the winter of 1888-89 Orson Buno & Son made a contract with the defendant Gomer to do certain work in the way of hauling logs through the winter, and taking care of the men, who were otherwise employed by Gomer. It is not in dispute that Buno & Son undertook this work, and that they boarded divers of Gomer's employees, and sold sundry goods and merchandise, for which Gomer, under the contract, was responsible. The work was completed in March, 1889, and according to Buno & Son's contention there remained due to them at that time the sum of about \$800 on account of these matters. Payment not being made according to their claim, they brought this suit to recover that balance, alleging generally the total sum due and payments to the extent of \$3,540.15, leaving, as stated, \$800, unpaid. The defendant took issue as to the amount of work done and as to the extent of the credits to which he was entitled. The case was referred to a referee and tried, and that officer reported the testimony and his findings to the court, and thereon judgment was entered in favor of the defendant. There was considerable controversy during the hearing before the referee as to the extent of the payments and as to the force and effect of the admission of payment contained in the plaintiff's plea. The plaintiff insisted that he had a right to introduce testimony varying from his plea, and gave notice

that he should move the court subsequently for leave to amend. He took no action, however, in this direction until after the referee reported.

The errors laid are not of very great gravity, nor are they of the substance and description which require this court to reverse the action of the lower tribunal. Substantially there are but three presented, and none of them require very elaborate consideration or discussion. The principal one is based on the inadequacy of the testimony to support the judgment and the further claim that it required a finding in favor of the plaintiff to a specified extent. This is not one of these cases which calls for our interference. The case was tried upon conflicting testimony, and there is abundant evidence in the record to support the finding of the referee and the judgment of the court. Under these circumstances, and our well established rule in such cases, we are not at liberty to use our individual judgment of the force and effect of the evidence in order to overturn the conclusion arrived at by the trial court.

The plaintiff insists that the referee committed numerous errors in admitting and receiving testimony, but we do not discover that the substantial rights of the parties were thereby prejudiced so that the right has come to the plaintiff to insist on a reversal of the judgment. The objections themselves are so general as to scarcely warrant consideration; but notwithstanding this technical deficiency, we have examined the record and are unable to perceive that any legitimate testimony which would conduce to the support of the plaintiff's case was excluded, or that any evidence harmful to the plaintiff's contention crept into the record.

The only other error insisted on is that claimed to have been committed by the court in denying to the plaintiff the right to amend his plea and withdraw what he contends was a damaging admission as to the payments. It cannot be conceded that this is an error on which the plaintiff can insist. It is undoubtedly true that our policy is one which permits the fullest and most generous amendments for the purpose

of protecting the rights of the parties. Whether an admission of this sort can be removed from the record and its legal effect destroyed in favor of him who has made it need not be determined. It is enough to say that these matters of amendment are entirely discretionary with the court, and, unless that discretion has been abused, appellate courts will not usually interfere with their action in the premises. In this particular case, it was not in harmony with good practice to await the report before making a motion of this description. The application should have been made the instant the error was discovered, and a broad and substantial showing of mistake was essential to entitle the party to relief in the premises. Under the circumstances surrounding this application and on the showing made, it cannot be seen that the court abused its powers or exceeded its rights in denying the motion. These brief references to the contentions of counsel dispose of the errors assigned.

There being no errors in the record sufficient to compel us to disturb the judgment, it will be affirmed.

Affirmed.

WEBER, PLAINTIFF IN ERROR, v. BAESSLER ET AL., DEFENDANTS IN ERROR.

8 459
14 256

1. STOPPAGE IN TRANSITU.

A vendor of goods sold on credit has a right to stop the same and resume possession thereof while they are in intermediate hands, in case the vendee becomes insolvent before acquiring actual possession thereof.

2. SAME.

Goods are regarded as being in transit until they have passed out of the possession of every intermediate agency; and until the transit has been determined by an actual delivery to the vendee or consignee the right of the vendor to reclaim the goods is unimpaired by any seizure thereof at the suit of creditors of the vendee.

3. SAME.

A delivery of the goods to an agent, whether of the vendor or vendee,

who holds them merely for the purpose of transmission to the vendee, is not a final delivery such as determines the right of stoppage.

4. SAME.

A delivery of the goods by an intermediate agent to a stranger, as to a sheriff holding a writ of attachment against the vendee, does not determine the right of stoppage.

Error to the District Court of Arapahoe County.

Mr. M. B. CARPENTER and Mr. W. N. MCBIRD, for plaintiff in error.

Mr. JAMES A. KILTON, for defendant in error.

THOMSON, J., delivered the opinion of the court.

This action is for the possession of personal property. The cause was submitted to the court below on the following agreed statement of facts:

On June 1, 1889, Thursie & Anderson, who were partners doing a retail shoe business in the city of Denver, ordered from the defendants in error, plaintiffs below, who were partners engaged in manufacturing and selling at wholesale shoes, in Buffalo, New York, a bill of shoes, amounting in the aggregate to the sum of \$297.

The plaintiffs, Baessler & Co., filled the order and shipped the same June 19, 1889, by railroad freight to Thursie & Anderson at Denver.

No part of the price of the shoes has been paid, the time for payment being sixty days after the filling of the order. The value of the goods is \$297.

On June 28, 1889, the goods arrived in Denver over the Union Pacific Railroad, shipped in the usual course of business.

June 21, 1889, Thursie & Anderson became, and still are, insolvent. On the last mentioned day several judgments were rendered against them, and their stock of goods seized under executions issued on the judgments; and on the next

day, June 22d, an attachment was sued out, and levied upon the same stock, subject to the prior levies.

All of these levies were made by the defendant as sheriff, who took the goods into his possession and closed up the business house of Thursie & Anderson.

On the 22d of July, 1889, the plaintiffs in the attachment suit recovered judgment against Thursie & Anderson, and caused execution to be issued and placed in the hands of the defendant as sheriff.

On June 28, 1889, the City Transfer Company, a common carrier in the city of Denver, to whom the goods had been transferred for final delivery, according to the custom in such cases presented to P. A. Anderson, a member of the firm of Thursie & Anderson, a bill for freight and delivery charges on the goods. This bill Anderson declined to pay, and at the same time declined to receive the goods, informing the agent of the Transfer Company that the defendant as sheriff had closed up the store of the firm, and levied upon all its goods, and that the goods in question should be returned to the plaintiffs, Baessler & Co., and not delivered at the firm's old place of business.

Afterwards, and on the same day, the transfer company delivered the goods to the defendant sheriff at the old place of business of Thursie & Anderson, and took his receipt for the same. At the time of receiving the goods, the defendant sheriff paid to the transfer company the freight charges due. The defendant, having thus obtained possession of the goods, levied upon them as sheriff under the attachment mentioned, and after July 22, 1889, levied upon them under the execution issued upon the judgment in the attachment suit.

The plaintiffs, Baessler & Co., tendered to the defendant the amount of freight charges paid by him and demanded possession of the goods, but defendant refused to deliver possession, or accept the freight charges.

The plaintiffs, Baessler & Co., did not know of the failing circumstances of Thursie & Anderson, or of the attachment, judgments and executions against them, until June 26, 1889,

when they immediately set about stopping the goods *in transitu*, making such effort as they could in that direction.

Prior to the delivery of the goods to the transfer company by the Union Pacific Railroad Company, Thursie & Anderson had given the transfer company a general order to obtain all freight received for them at any railroad station in Denver, which order was in force June 28, 1889, at the time the transfer company received the goods.

At the time the transfer company received the goods it had no notice of the failing circumstances of Thursie & Anderson, and the Union Pacific Railroad Company had not received instructions to stop the goods.

Upon these facts the court found that the plaintiffs were entitled to the possession of the goods, and rendered judgment accordingly. The defendant comes here by writ of error.

The application of the doctrine of stoppage *in transitu* to the foregoing facts constitutes the only controversy in this case. A vendor has the right to stop goods sold and unpaid for, while they are in intermediate hands, in case the vendee becomes insolvent before he has acquired the actual possession of them. The origin of the doctrine is involved in some obscurity, and the reasons on which it is based are differently and not very satisfactorily stated by different courts; but the right of the vendor to resume possession of goods which have not been paid for, while on their way to the vendee, or still undelivered to him, in case of his insolvency, is thoroughly established. This right must be exercised while the goods are on their passage and before possession is taken by the vendee; and if they have ceased to be in transit, and have come into the hands of the vendee, or of his agent for custody, the vendor's right of stoppage is defeated. The goods are regarded as in transit until they have passed out of the possession of every intermediate agency, and have been actually delivered to the consignee; and until the transit has been determined by such actual delivery, the right of the vendor to reclaim the goods is unimpaired. This right is not

affected in the slightest degree by any intervening seizure of the goods at the suit of creditors of the vendee. While it exists, it is paramount to any other lien or claim. *Smith v. Gaffs*, 1 Campb. 282; *Buckley v. Furniss*, 15 Wend. 137; Hilliard on Sales, 289; *Morris v. Shryock*, 50 Miss. 590.

It is contended that the general order, given by Thursie & Anderson to the City Transfer Company, authorizing the delivery to it of all freight received for them at any railroad station in Denver, constituted the transfer company their agent, so that the delivery to it of the goods in question was a delivery to them, and that upon such delivery the transit was at an end. We do not think this position tenable. The City Transfer Company was a common carrier. It carried goods for the public, and not specially for Thursie & Anderson. The order was merely the designation of that company as the agency through which they desired their goods to be transported from the railroad stations in Denver to their place of business. These goods were transferred to it for final delivery. According to the custom in such cases, it presented (by its collector) to Thursie & Anderson the bill for freight charges on the goods; so that it seems to have been the agent of the railroad companies to collect freight money due them, as well as the agent of consignees for the delivery of goods; and it is to be inferred from the language of the agreed statement that the payment of these freight charges by Thursie & Anderson to it was a condition precedent to the delivery by it, to them, of the goods of which they had taken charge. It is clear that the City Transfer Company was simply the last carrier between the city of Buffalo, where the goods were originally shipped, and the place of business of Thursie & Anderson in Denver, and so connected with the different lines over which the goods were transported that it collected the entire charges for carriage, including its own. Its relation to Thursie & Anderson was therefore that of common carrier, selected by them to do their business, and nothing more.

But there is another reason why the delivery of the goods

to the company was not such delivery as would cut off any right of plaintiffs. It is true that final delivery, so as to determine the transit, may be made to an agent as well as to the principal; but such agent must be an agent to receive possession of the goods and keep them for the principal. A delivery at the station to the vendee himself, or to his servant, sent by him for the purpose of receiving them, is a delivery to him; but a delivery to an agent, whether he be the agent of the vendor or the vendee, who holds the goods merely for the purpose of transmission to the vendee, is not final delivery. Story on Sales, § 334; 2 Benj. on Sales, Rev. Ed. 1071, 1072, secs. 1247, 1248, 1249; *Morris v. Shryock*, *supra*.

The delivery of the goods by the railroad company to the transfer company was therefore not a delivery to Thursie & Anderson; and during the time they were in the possession of the transfer company, they were still in transit, and subject to stoppage by the plaintiffs. They were not delivered to Thursie & Anderson at all. Thursie & Anderson refused to receive them, and directed that they should not be delivered at their old place of business, but should be returned to the plaintiffs. The transfer company, afterwards, in disobedience of these directions, delivered them at the old place of business of Thursie & Anderson, to the defendant sheriff. Down to the moment of that delivery the goods were in transit. What was the effect of such delivery to the defendant? He was not the agent of Thursie & Anderson, or of the plaintiffs. He was a stranger. A delivery to him was certainly no delivery whatever to Thursie & Anderson. The transfer company held the goods subject to the right of recall by the plaintiffs. It was not in its power to do anything by which that right could be defeated or compromised, except to deliver the goods to the consignees, and this it did not do. It could transfer to the defendant no greater right to the goods, or dominion over them, than it possessed; so that the defendant, in taking the goods, assumed the same relation to Thursie & Anderson, and to the plaintiffs, which had been

occupied by the transfer company. By the transfer to him, and by his acts as an officer in levying the writs, the rights of the plaintiffs in respect to the goods were not changed in the smallest particular. It does not appear when demand was made by the plaintiffs upon the defendant for the goods, but it is presumed that proper diligence was exercised in that regard. No complaint is made of undue delay. By the demand, the right of stoppage *in transitu* was properly exercised, and from the time of the demand the plaintiffs were entitled to the possession of the property. *More v. Lott*, 13 Nev. 376; *Kingham v. Denison*, 84 Mich. 608; *Clark v. Bartlett*, 50 Wis. 543; *Morris v. Shryock*, *supra*; *Grout v. Hill*, 4 Gray, 361.

The judgment is correct and will be affirmed.

Affirmed.

THE RIO GRANDE WESTERN RY. CO., APPELLANT, v.
VAUGHN, APPELLEE.

3	465
4	150
3	465
6	65
22c	221
3	465
12	3

CONSTITUTIONAL LAW.

The railroad stock-killing act is unconstitutional.

Appeal from the County Court of Mesa County.

Mr. CHARLES F. CASWELL, for appellant.

No appearance for appellee.

THOMSON, J., delivered the opinion of the court.

This is an action to recover damages for the killing of a horse belonging to the appellee, plaintiff below. The case was commenced before a justice of the peace and there were no written pleadings. It was appealed to the county court, where judgment was rendered against the defendant for \$200

damages for the killing of the horse, and \$100 attorneys' fees. None of the evidence is preserved in the record, so that we are unadvised as to whether a recovery by plaintiff would have been authorized by the rules of the common law ; but even if so, the judgment is erroneous, because the finding of the court is that the value of the horse was \$100, and that sum, therefore, would be the limit of recovery.

The judgment, however, is in terms based upon the statutory, and not the common law, liability of the defendant. It is conceded that the plaintiff complied with the statutory requirements, and, under the evidence, was entitled to the judgment which was rendered in his favor, provided the statute itself is valid. The sole question presented by the argument is as to the constitutionality of sections 13 and 14, chapter 93, of the General Statutes of Colorado, and the subsequent amendments to section 14. This section was amended by an act approved March 31, 1885 (Session Laws of 1885, page 304); and again, by an act approved April 6, 1891 (Session Laws 1891, page 281). Neither of the amendments made any substantial change in the original section, and they did not differ materially from each other.

The constitutional question presented has been settled in this state, both by the Supreme Court and by this court. *Wadsworth v. Union Pac. Ry. Co.*, 18 Colo. 600 ; *D. & R. G. Ry. Co. v. Outcalt*, 2 Colo. App. 395.

In both of these cases the law was held unconstitutional. The judgment is reversed, with leave to the plaintiff, if he so desires, to proceed to a new trial in accordance with common law principles.

Reversed.

ESBENSEN, APPELLANT, v. HOVER ET AL., APPELLEES.

3	467
25c	238
3	467
388	122

1. PRACTICE—COUNTERCLAIM.

A defendant in an action in which a writ of attachment has been issued and levied cannot set up a counterclaim for damages sustained by reason of an excessive levy under the writ.

2. PLEADING—PAYMENT.

Where the facts constituting the cause of action for goods sold and delivered are stated in the complaint, together with an allegation of nonpayment, proof of payment is inadmissible unless it be specially pleaded. A denial will not suffice.

3. PRACTICE—JUDGMENT ON THE PLEADINGS.

Where the facts constituting a cause of action are specially admitted by the answer, a judgment may be entered against the defendant on the pleadings, notwithstanding the complaint contains an allegation of nonpayment and the answer denies it.

Appeal from the District Court of Arapahoe County.

Mr. JOHN C. FITNAM, for appellant.

Mr. R. D. THOMPSON, for appellee.

THOMSON, J., delivered the opinion of the court.

This is an action for goods sold and delivered. The complaint alleges the sale and delivery, and the value and price of the goods; and avers that no part of such price has been paid. The answer admits the sale, delivery and price, but denies each and every other allegation of the complaint. The answer also contains a counterclaim for damages, for an excessive levy under a writ of attachment which it alleges was issued in the action. A demurrer to the counterclaim was sustained, and judgment on the pleadings given for the plaintiff, from which the defendant appeals.

There is nothing in the record to show that any affidavit for attachment was ever made or writ issued in the case. The only information we have on that subject is derived from

the counterclaim. But assuming that such writ was issued, levy made, and damages sustained as claimed, and by reason of which defendant has a cause of action against the plaintiff, still such cause of action cannot be made a counterclaim in this suit. Section 57 of the Code defines a counterclaim as a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; or a cause of action upon contract and existing at the commencement of the suit. This counterclaim did not arise out of the transaction set forth in the complaint, and was not connected with the subject of the action. The transaction was the sale and delivery of the goods, and the price of the goods was the subject of the action. With such sale and delivery, or with such price, the counterclaim has nothing to do. It arises out of an alleged tort, committed in the course of the prosecution by the plaintiff of his remedy for the enforcement of the claim. It had no existence when the alleged writ was issued, and if no writ had been issued in the case it never would have had an existence. It was a wrong done to the defendant not necessary to the enforcement of plaintiff's remedy, and is on the same footing with any other wrong which the plaintiff might have committed upon the defendant. The court very properly sustained the demurrer.

The question of the effect of a general denial upon the allegation of failure to pay for the goods is one of somewhat more difficulty, arising out of an apparent want of harmony among the authorities. In California it is held that a general denial puts in issue an allegation of nonpayment in the complaint. But in that state the averment of nonpayment seems to be essential, and without it there is no cause of action stated, so that a denial of that is a denial of a material allegation. *Frisch v. Calor*, 21 Cal. 71; *Fairchild v. Amsbaugh*, 22 Cal. 572; Pom. Rem. § 700.

In *Quin v. Lloyd*, 41 N. Y. 349, the plaintiff sued for a balance due, and the court held that the denial involved an issue upon all the facts stated and denied, and admitted.

proof of the different payments made, so as to determine what in fact was the balance of the debt. The plaintiff having admitted payments, the denial of the balance due authorized an inquiry as to the amounts paid. In *Marley v. Smith*, 4 Kan. 183, the plaintiff alleged that the defendant was indebted to him in the sum of seventy-five dollars on an account, a copy of which was annexed to the complaint; and under a general denial, the court held that proof of payment might be introduced, because the petition did not state the facts constituting the defendant's liability, but merely the indebtedness; saying that if petitioner chose to rely on such a statement of his case, he must be prepared to receive proof of facts showing that such indebtedness did not exist. But in *Stevens v. Thompson*, 5 Kan. 305, where the action was for goods sold and delivered, the court held that the denial put nothing in issue but the sale, delivery and value of the goods, and distinguished the case of *Marley v. Smith*, *supra*, because in it the petition only stated the indebtedness generally, without setting forth the grounds of the indebtedness, whereas in *Stevens v. Thompson*, the facts constituting the plaintiff's claim were fully stated; and the court therefore held that only those facts were denied by the answer. An examination of all the cases outside of California, that have come under our notice, in which proof of payment was permitted under a general denial, discloses that there was some peculiarity in the statement of the cause of action, either in the manner of such statement, or in the admission of payments, in which the court found a warrant for its ruling; but the great weight of authority in code states is that in a case like the present where the facts constituting the cause of action are stated, in order that proof of payment may be admitted, it must be specially pleaded. A denial will not suffice. The plaintiff is not called upon to prove nonpayment in the first instance. When he has established the facts alleged in his complaint, the burden is upon the defendant to show that the indebtedness has been discharged. Whether nonpayment is averred by the plaintiff or not is immaterial.

Payment is a defense, and like all other matters of confession and avoidance, it must be affirmatively and not negatively or inferentially set up: *Hugler v. Pullen*, 9 Ind. 273; *McKyring v. Bull*, 16 N. Y. 297; *Martin v. Pugh*, 23 Wis. 184; *Basset v. Lereder*, 1 Hun, 274; Bliss on Code Pleadings, § 357.

While the question has not been directly passed upon by our own Supreme Court, the following in *Perot v. Cooper*, 17 Colo. 80, would seem to indicate its opinion: "The general rule is, that a plea of payment *being an affirmative defense*, must be supported by a preponderance of the evidence in order to be effective in favor of the party pleading it."

From our examination of the reasons given in the cases which seem to hold a contrary doctrine, it is our opinion that the variance is more apparent than real, and that where the facts are stated, as they are here, there is no substantial conflict.

There being no plea of payment in this case, and a cause of action being specially admitted by the answer, the judgment was properly rendered in favor of the plaintiff and against the defendant on the pleadings, and nothing remains for us except to affirm the judgment.

Affirmed.

BREENE, APPELLANT, v. BOOTH, APPELLEE.

3	470
19c	313
3	470
36	141
3	470
9	47

1. AMENDMENT OF RECORD.

A court has inherent power to amend its record *nunc pro tunc* so as to make it express what was done at the time.

2. SAME.

Clerical errors may be corrected by the trial court after a cause has been appealed, and such corrections may be brought into the appellate court by supplemental transcript and be there considered as a part of the original record. This is not permitted, however, where the character of the judgment is essentially changed or a new and different judgment substituted.

3. JUDGMENT.

When an action is brought against copartners to collect a firm debt, it is erroneous to enter judgment against one of the parties as for an individual debt.

Appeal from the District Court of Lake County.

Mr. J. A. EWING and Mr. GEO. Q. RICHMOND, for appellant.

Mr. A. W. STONE and Mr. A. T. GUNNELL, for appellee.

THOMSON, J., delivered the opinion of the court.

The complaint in this case alleges that the defendants, George W. Purviance and Peter W. Breene, were copartners under the firm name of George W. Purviance & Co., and that the plaintiff, W. T. Booth, was the assignee and owner of sundry claims against the firm, aggregating \$1,712.51. Summons was served upon both defendants. Purviance made default, but Breene answered denying the copartnership, and denying any and all liability against him on account of the claims, or any of them. The cause was tried by the court and judgment entered against Breene alone for the full amount claimed. The judgment was rendered on the 17th day of December, 1891. Breene prayed an appeal to this court, which was allowed, his appeal bond to be filed in thirty days and his bill of exceptions in sixty days. The appeal was duly perfected in accordance with the order, and a transcript of the record filed here on the 11th day of April, 1892. On the 12th day of May, 1892, the printed abstract of the record was filed, and on the 11th day of July, 1892, the appellant filed his printed brief. On the 22d day of July, 1892, the plaintiff and appellee filed in the court below his motion as follows:

“In the district court of the county of Lake, state of Colorado.

“W. T. Booth, plaintiff, v. George W. Purviance and Peter

W. Breene as copartners, using the copartnership name of George W. Purviance & Co., defendants. Motion.

“ Now comes the plaintiff by his attorneys, A. W. Stone and A. T. Gunnell, and show to the court that on the 17th day of December, 1891, judgment was entered in said court against the defendants above named for the sum of \$1,820.55, which appears from the entry in the docket of said court. That by a clerical error, made by the clerk of said court, in recording the judgment so made by said court in the journal kept by said court, the judgment was recorded therein as against Peter W. Breene ; from which judgment he alone appealed to the court of appeals of said state.

“ Whereupon the plaintiff moves the court that judgment now be entered in the journal of said court to correspond with the judgment rendered by the court in said case against George W. Purvince *nunc pro tunc*.

“ A. W. STONE,

“ A. T. GUNNELL,

“ Plaintiff's Attorneys.”

This motion was sustained and the following order and judgment entered :

“ March Term A. D. 1892.

“ Monday, July 25th, A. D. 1892.

“ W. T. Booth v. George W. Purviance and Peter W. Breene, as partners, using the name of Geo. W. Purviance & Co. Motion to enter judgment in the journal of said court, *nunc pro tunc*.

“ This motion now coming on to be heard, A. W. Stone, Esq., appearing for the plaintiff, and John A. Ewing, Esq., for defendant Breene, and the said motion being argued by the respective counsel, and it appearing to the court that on the 3d day of August, 1891, default was regularly entered by the court against Geo. W. Purviance for having failed to plead to said action, and that afterwards on the 17th day of December, 1891, a judgment was by the court rendered against both of the defendants in said action for the sum of \$1,820.55 and costs ;

“ And it further appearing to the court that by an error of the clerk of said court in entering said judgment in the journal of said court it was only entered as against one of the defendants, Peter W. Breene, when it should have been recorded against both the defendants, Peter W. Breene and Geo. W. Purviance, and the court now being fully advised in the premises doth grant said motion; and the defendant Purviance being still in default,—

“ It is therefore now considered, ordered, and adjudged by the court that the plaintiff do have and recover of the defendants, Geo. W. Purviance and Peter W. Breene, the sum of \$1,820.55 and costs of suit. And that the same be entered and recorded in the journal of said court as of the 17th day of December, 1891, the date of said judgment.”

By leave of this court a supplemental transcript, containing the foregoing motion and judgment, was filed here on the 26th day of September, 1892.

It is contended that the last order reaches back to the date of the original judgment; that its effect is the same as if judgment had in the first instance been given against the co-partnership; and that in passing upon the case we must confine our consideration to the joint judgment, which, as is claimed, is now the only judgment of the court below. There is no doubt of the power of a court *nunc pro tunc* to amend its record so as to make it express what was done at the time. This power is inherent in courts, is not dependent upon statute for its existence, but has always been asserted. But the authority to reform judgments, while it unquestionably exists, must be exercised within limits and subject to conditions. Whether the proper limits and conditions were observed in this instance; whether the judgment as corrected is valid and can be enforced by process issuing out of the court which rendered it; and generally what its force and effect there may be,—it is not important at present to determine. No appeal from such judgment has been prosecuted to this court. The judgment from which the appeal was taken was an individual judgment against Breene and not

against the firm. The prayer for appeal, the allowance of the appeal, the assignment of errors, and the joinder in error, all have reference solely to that judgment. It was the only one from which the appeal could be taken. The other had no existence.

It is true that after a cause has been appealed, clerical errors in the record may be corrected by the trial court, the corrections brought into the appellate court by supplemental transcript, and there considered as if they were part of the original record. This has been allowed where through inadvertence some evidence was omitted from the transcript, or some untrue statement inserted, or the judgment entry contained misrecitals; the identity of the record meanwhile remaining unimpaired. *Wolfley et al. v. Lebanon Mining Co.*, 3 Colo. 296; *Knox et al. v. McFerran*, 4 Colo. 348; *Pleyte v. Pleyte*, 15 Colo. 44.

But we have found no case in which this was permitted where the character of the judgment was essentially changed, and in effect a new and different judgment substituted. The rights of a judgment creditor under a judgment against a copartnership, and under a judgment against an individual member, are not the same. In the former case he must exhaust the partnership property before having recourse to the individual, while in the latter it is the property of the individual only that is bound. In this instance not only has the effect of the judgment itself been changed, but the new judgment and the old are against different parties. We do not wish to be understood as questioning the efficacy of the reformed judgment in the court below; we merely say that it is not in this court in any manner provided by law, and that the only appeal taken is from the judgment originally entered. The change having been made while the appeal was pending, and being so radical in its character, it does not come within any rule which would warrant us in considering it as a part of the record in this court. The only question left for determination is whether it was proper to render judgment against Breene alone for the amount of the

indebtedness, and that question has been settled in this state by our supreme court and also by this court. *Bissell et al. v. Cushman*, 5 Colo. 76; *Craig v. Smith*, 10 Colo. 220; *Des-sauer v. Koppin*, ante, 115.

The judgment against Breene is therefore erroneous and must be reversed.

Reversed.

CASH, APPELLANT, v. THORNTON, APPELLEE.

1. WATER RIGHTS.

The right to the use of water for irrigating purposes is a right of property, the subject of ownership like any other property.

2. SAME.

The true test of the appropriation of water is the successful application thereof to the beneficial use designed.

3. DAMAGES.

A judgment for damages for the diversion of water can only be based upon the ownership or right of property in the water, and the wrongful invasion of that right.

Appeal from the District Court of La Plata County.

Mr. O. S. GALBREATH, for appellant.

Mr. J. L. RUSSELL, for appellee.

REED, J., delivered the opinion of the court.

The suit was brought by appellee. In the complaint it is alleged:

That the plaintiff was the owner and in the occupancy of certain lands.

That on the 14th day of April, 1888, he and his partner, one Smith, whose interest he bought prior to bringing the suit, commenced the construction of a ditch from Red creek to supply the land with water for irrigating purposes.

That the construction of the ditch was diligently prosecuted. (By the evidence it is shown that the ditch was completed in June following.)

That after its completion all the water of the creek was carried by such ditch and applied to plaintiff's land and amounted to $8\frac{1}{2}$ cubic feet of water per second.

That about the first of June, 1891, while he was carrying it in the ditch and using it upon his crops, defendant diverted the water and used it upon his own land and crops, and that by reason of such diversion he was damaged \$2,000.

For a second cause of action it was alleged one Shales, who owned and occupied the same land, appropriated and applied the waters of Red creek to the land in 1881; that the right so acquired was never abandoned by Shales, and passed by him to plaintiff with the land. That the defendant claimed the right to all the water in Red creek and had diverted and appropriated it to his own use. Praying an injunction restraining defendant from using the water, and damages of \$2,000 for the diversion and injury.

The defendant, in answer, after denying the allegations of the complaint, except as to the taking and use of the water in June, 1891, as alleged in the complaint, which was admitted, alleged "that he long prior to the 14th day of April, 1888, diverted all the waters out of Red creek and applied them to his own land; that he was the first appropriator and entitled to priority," etc.

A trial was had upon the issues made, over 600 folios of testimony taken, almost entirely upon the alleged priorities and rights of the parties respectively to the water in question. The jury was charged at length by the court in regard to the question of priority of the respective claimants and the law controlling the case. The jury found for the plaintiff in the sum of \$250 as damages for the diversion, but nothing as to priority or the rights of the parties to the water in controversy. A motion made to set aside the verdict and for a new trial, "whereupon, plaintiff by his said attorneys, offers in open court to waive all rights to injunctive relief herein, and

14.

to remit \$100 of the damages awarded the plaintiff by the verdict of the jury herein, which were duly allowed by the court and accordingly done. Thereupon, the court being fully advised in the premises, *and upon condition that plaintiff waive all contention that any specific right to priorities in water has been determined by said verdict, and the said waiver then and there made by plaintiff, doth overrule said motion to set aside the verdict and for a new trial.*"

To all of which defendant duly excepted.

The court caused the following judgment to be entered of record :—

"Whereupon the court, being now fully advised in the premises, doth now order, adjudge and decree that plaintiff, Daniel Thornton, do now have and recover of and from the said defendant, James Cash, the sum of one hundred and fifty dollars damages herein and his costs taxed at — dollars; and all claim for injunctive relief being waived by the plaintiff herein, it is now further ordered that the respective rights of the plaintiff and defendant herein to the waters of Red creek be deemed and held unaffected in any manner by this judgment; nor shall this judgment be taken or held to give the plaintiff any right to any specific waters of said Red creek, nothing herein being determined respecting the appropriation or priorities of the waters of said Red creek."

To which defendant excepted and prosecuted an appeal to this court.

The result of the proceeding was such that it must be regarded as a mistrial. The only basis upon which a judgment for damages could be predicated was stipulated out of the case by the plaintiff and expressly excluded by the judgment of the court. The right to the use of water for irrigating purposes is a right of property, the subject of ownership like any other property. Although the manner of acquiring the right of property in the use of water is peculiar and different from that of other property, such right to use must be determined like any other property right upon the ownership.

It does not appear that there had been any former adjudi-

cation or decree defining the rights of the parties to the water in controversy. It is declared in the State Constitution: "Priority of appropriation shall give the better right as between those using the water for the same purpose." The supreme court of this state, in *Thomas v. Guiraud*, 6 Colo. 532, declared, "The true test of the appropriation of water is the successful application thereof to the beneficial use designed," which decision has been since followed. The plaintiff in his complaint claims such priority; the earliest appropriation and application of the water. This is traversed in the answer, and the alleged priority of the defendant to the same water asserted. A lengthy trial was had to determine such priority and the right to the ownership of the use of the water, and the jury was elaborately charged upon the law involved. Such question of ownership or title was ignored by the jury, and no finding made, unless presumed to have been made incidentally for the purposes of the case and not declared. Were it not for the stipulation and judgment of the court, possibly this view might prevail and the verdict be allowed to stand. But when we find by the stipulation and judgment a declaration that nothing was adjudicated or determined in regard to the ownership, the presumption that might have been indulged is destroyed. A judgment for damages for the diversion of water could only be based upon the ownership or right of property in the water and the wrongful invasion of that right. Both claiming the ownership under the constitution and laws, unless such right of property was found, the effect of awarding damages for the diversion was quite likely to be against the owner for the lawful use of his own property.

The ownership to the right to the use of the water not only having not been tried, but having been by the stipulation and judgment expressly so declared, there was no legal basis or foundation upon which a judgment for damages could rest. If A and B both claim to be the owners of the same horse and B gets the possession and puts him to work, and A brings suit for its recovery and damages for its detention,

alleging ownership, and B answers, asserting his ownership, a verdict and judgment for the detention and damages could hardly stand, if it was expressly declared that nothing in regard to the ownership of the horse had been adjudicated or found, and thus allowing damages for the use of an animal that might belong to either, or to a neighbor.

The judgment will be reversed and cause remanded for a new trial.

Reversed.

BEARD ET AL., APPELLANTS, v. BLILEY, APPELLEE.

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7	19
3	479
8	183
9	514

1. APPELLATE PRACTICE.

Where there is any legal, competent evidence to sustain the verdict, it will not be disturbed; and where the evidence is conflicting and contradictory, the court will not attempt to decide upon the credibility of witnesses or weight of evidence.

2. FRAUD.

Actual or positive fraud consists in deception practised in order to induce another to part with property, or to surrender some legal right, and which accomplishes the end designed. The deception must relate to facts then existing or which had previously existed, and which were material to the dealings between the parties in which the deception was employed. In order to render it actionable, it should appear that the representations were made as alleged, that they were made in order to influence the plaintiff's conduct, that, relying upon them, the plaintiff did enter into a contract, or otherwise act as desired, that the representations were untrue, that the plaintiff suffered damage from the action he was induced to take, and that this damage followed proximately the deception.

3. SAME.

A mere speculative statement or expression of opinion is not of itself a sufficient basis of an action for fraud.

4. BURDEN OF PROOF.

Fraud is never presumed. The party relying upon fraud must prove it.

5. QUANTUM OF PROOF.

Proof of fraud must be sufficient to overcome the legal presumption of honesty, which obtains in all cases.

Appeal from the District Court of Pitkin County.

Messrs. WILSON & SALMON, for appellants.

Mr. T. M. S. RHETT, for appellee.

REED, J., delivered the opinion of the court.

Appellant A. A. Beard had an interest in a lease and bond upon a mine; sold a portion of it to the appellee, for which appellee made his promissory note, dated August 22, 1889, for \$800, payable one year after date, with interest at one per cent per month; secured it by a trust deed upon his property in the town of Aspen. The mine failed to pay, and two or three months after the execution of the note work was suspended and the property abandoned by the lessees. After the maturity of the note, it was assigned by A. A. Beard to his wife, E. R. Beard. Appellant Donegan was trustee in the deed of trust, and at the instance of the Beards proceeded to advertise the property for sale to pay the money secured by it, whereupon appellee brought suit to restrain the sale of the property, alleging in the complaint that appellant fraudulently obtained the note and deed of trust by misrepresentations in regard to the value of the mining interest for which the note was given, and the condition and product of the mine, and, in effect, that there was want of consideration for the note; also that the note was assigned by A. A. Beard to his wife, E. R. Beard, without consideration, and in fact remained the property of A. A. Beard.

The allegations of the complaint were traversed in the answer, and upon the issues so made a trial was had. A jury was called and the two following questions of fact were submitted for its determination:

“*First.* Did defendant A. A. Beard make to the plaintiff, Bliley, the representations set forth in the complaint in good faith?”

“*Second.* Did plaintiff rely on the representations made to him by said Beard, if so made?”

The questions, though rather inartificially drawn, were sufficient to present the issues submitted. 1st. Whether representations were made. 2d. Whether they were accepted and acted upon by Bliley and were the inducement in the transaction, and whether true and made by Beard in good faith, or were knowingly false and fraudulent.

After hearing the evidence of the respective parties and being properly charged by the court, the jury returned findings, answering the first question in the negative and the second in the affirmative, fully establishing the allegations of fraud in the complaint. The court adopted the findings of the jury, and filed a decree perpetually restraining the defendants from proceeding to collect the note and that the trust deed made to secure it be canceled. From such judgment and decree an appeal was prosecuted to this court.

It is contended in argument that the evidence was insufficient to warrant the findings of the jury, and that the court erred in adopting such findings and in decreeing the note void. This is the only ground relied upon for a reversal. The province and duties of a jury are as well defined as those of the judge of the trial court or the judges of this court. The court had the right and authority to submit questions of fact to the jury, and unless some legal principle is violated and the verdict is the result of incompetent and inadmissible evidence, or it is evident that it results from the misapplication of the law of evidence, or it is apparent that through willful and criminal prejudice or bias the finding is at variance with all the evidence in the case, courts have neither power nor inclination to invade the province of that branch of a trial court. It is not enough, on the printed testimony presented to a court of review, that the court concludes, by the reading of the evidence, that the jury should have found differently. The jury and witnesses are brought together, and the jury are to consider not only the matter testified, but the character and credibility of witnesses. It is their peculiar province. While one man's evidence, when printed and filed in a court of review, may appear equally

as truthful and reliable as that of another, there may have been upon the trial circumstances or incidents rendering it absolutely unworthy of credit, facts of which this court could have no information; and when, as in this case, the only important facts rest upon the contradictory and conflicting statements of the two principals, if any finding is made by the jury, one or the other must go to the wall. The finding as to credibility cannot be reviewed in this court. The rule of both the supreme court and this court has been frequently stated and reiterated, that where there is any legal competent evidence to sustain the verdict it will not be disturbed; and where the evidence is conflicting and contradictory, the courts will not attempt to decide upon the credibility of witnesses or weight of evidence, but must adopt the conclusions of the jury.

The basis of the suit upon which equitable relief was asked was, that the note and deed of trust were obtained by fraudulent misrepresentations of the value and condition of the mining property, for the purchase of which the note was given. "Actual or positive fraud consists in deception practised in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. The deception must relate to facts then existing or which had previously existed, and which were material to the dealings between the parties in which the deception was employed. In order to render it actionable the following facts should appear:

"First, that the representations were made as alleged.

"Second, that they were made in order to influence the plaintiff's conduct.

"Third, that, relying upon them, the plaintiff did enter into a contract, or otherwise act as was desired.

"Fourth, that the representations were untrue.

"Fifth, that the plaintiff suffered damage from the action he was induced to take; and

"Sixth, that this damage followed proximately the deception." Cooley on Torts, secs. 474, 475.

“Fraud in equity properly includes all acts, omissions and concealments by which an undue and unconscientious advantage is taken of another.” Story’s Eq. Juris., sec. 187; 1 Fonb. Eq., b. 1, chap. 263.

In *Green v. Nixon*, 23 Beav. 330, it was said: “Fraud implies a willful act on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to.”

In *Detroit v. Weber*, 26 Mich. 284, it was said: “Fraud consists in a person being induced to act to his prejudice by untruthful statements made by another upon whom he had right to rely, and whose duty it was to state the case truly.” See also, *Sellar v. Clelland*, 2 Colo. 532; *Byard v. Holmes*, 34 N. J. 296.

Taking the well settled rule of law, that the fraudulent statements must relate to facts then existing, or which had previously existed and which were material, etc., we find two of the alleged representations, which were speculative matters of opinion and resting in the future, withdrawn from consideration, viz., that he, Beard, was about to go east soon, and could and would dispose of the lease at large profit to all interested; that he was about to put machinery on the premises and wanted the plaintiff to set it up and run the same; leaving only the following:

First, that the lease was paying expenses and that plaintiff would not have a dollar to pay in the way of assessment.

Second, that he and the other lessors had secured from the owners an extension of the lease of the mine.

Taking up the latter first, we find the statement to have been substantially, though, perhaps, not technically, correct. There had been no written extension, but there was an existing agreement for one, which was afterwards indorsed upon it and executed. It is contended that the statement was false, as Beard represented that the lease was to be extended according to its terms, whereas it contained requirements more burdensome than the original. It is only necessary to say that nothing of the kind appears in the written indorse-

ment extending the lease. One witness testified there was to be 50 feet of "dead work" done, but that could not add to or change the written agreement. The admission of the testimony is urged as error. Technically it probably should not have been allowed, but I cannot see how any one was prejudiced by it, and it appearing that before the expiration of the original lease plaintiff abandoned and ceased to prosecute work on the mine because of losses sustained, we are at a loss to understand what pertinency there was in the whole inquiry in regard to the truth or falsity of the statement, when we apply the rule that in order to be actionable the statement must have been such that "the plaintiff suffered damage by reason of it." No such injury was shown or attempted.

The only remaining alleged false statements were, that the lease was paying expenses and plaintiff would have no assessments to pay. The first was a matter of fact resting of necessity within the knowledge of the defendant, and of which the plaintiff could gain no knowledge by an examination of the property, and that supposed fact, together with the expectation of profits from more extensive and economical work, must be regarded as the inducement to the purchase. The latter statement, that no assessments would be required, being in the future, must be regarded as speculative and an expression of opinion, and could not of itself be the basis of an action.

The evidence in regard to the statement that the mine was paying expenses was contradictory, but the jury evidently found the fact for the plaintiff. That it was false, and was not and never had been paying expenses was fully established by uncontradicted testimony, and the fact that plaintiff, for his small interest, was charged some \$90 per month for the first two months, shows that it fell far short of paying expenses. The sale for less than cost and the sale to Silver of another interest at about the same time, at a reduced price, payment to be made in clothing, were circumstances going

far to establish the willful falsity of the statements and deliberate fraud of the defendant.

It is urged in argument, that plaintiff's case failed for want of proof, and that the court erred in finding for the plaintiff, and the following is cited from *Southern Development Co. v. Silva*, 125 U. S. 247: "The answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill, and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud. *Vigel v. Hopp*, 104 U. S. 441; Story Eq. Jur. § 1528; Daniell Ch. Pr. 844. The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations."

It is a well known fact that the rules, practice and requirements of the federal courts are peculiar to those courts, based upon a series of rules adopted from the old English equity practice, and pertain to purely equitable cases. Those rules have no place in practice in the state courts and cannot prevail here. The modern and controlling doctrine in state courts is stated as follows:

(Cooley on Torts, 556, 557:) "Fraud is never presumed, and the party alleging and relying upon it must prove it. This, however, is one of those rules of law which is to be applied with caution and circumspection. 'So far as it goes, it is based on a principle which has no more application to frauds than any other subject of judicial inquiry. It amounts but to this, that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial.' Fraud is therefore as properly made out by marshaling the

circumstances surrounding the transaction, and deducing therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive; and, indeed, circumstantial proof in most cases can alone bring the fraud to light, for fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced not in the open proclamation of the wrongdoer's purpose, but by the indications of covered tracks and studious concealments. And while it is often said that to justify the imputation of fraud, the facts must be such as are not explicable on any other hypothesis, yet this can mean no more than this, that the court or jury should be cautious in deducing the fraudulent purpose; for whatever satisfies the mind and conscience that fraud has been practised is sufficient."

It is the well settled doctrine that in all cases the presumption is in favor of honesty, and in civil proceedings fraud requires no higher measure of proof than is required in many other cases. It must be sufficient to overcome the legal presumption of honesty. See *Hill v. Reifsinder*, 46 Md. 555; *Baldwin v. Buckland*, 11 Mich. 389; *Bowden v. Bowden*, 75 Ill. 143; *London etc. Bank v. Lempriere*, L. R. 4 P. C. 527; *Smith v. Chadwick*, L. R. 9 App. Cas. 187; *Hildreth v. Sands*, 2 Johns. Ch. 35; *Devoe v. Brandt*, 53 N. Y. 462; *Kane v. Weigley*, 22 Pa. St. 179.

In our view of the case, no serious error occurred upon the trial. The facts necessary to constitute a cause of action having been found by a jury, the finding and decree of the court were warranted and should be affirmed.

Affirmed.

SPRINGER, APPELLANT, v. KREEGER, APPELLEE.

1. STATUTE OF FRAUDS.

Every sale made by a vendor of chattels in his possession, or under his control, unless the same be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things sold, is conclusively presumed to be fraudulent and void.

2. SAME.

The vendee must take actual possession, and the possession must be open, notorious and unequivocal, so as to apprise the community, or those accustomed to deal with the party that the goods have changed hands and that the title has passed.

3. SAME.

When the subject of the sale does not reasonably admit of an actual delivery, it is sufficient if the vendee assume actual control and dominion of the property so as to reasonably indicate to all concerned the change of ownership.

4. EVIDENCE.

Where the issue is as to whether an actual change of possession of the goods took place, the books of the warehouse in which they were stored at and after the time of the sale are admissible to show whether or not there has been such a change.

Appeal from the District Court of Las Animas County.

Messrs. NORTHCUTT & FRANKS, for appellant.

Mr. BO SWEENEY and Mr. JOHN A. GORDON, for appellee.

REED, J., delivered the opinion of the court.

In December, 1890, The Acme Fence Company doing business in New Mexico ordered a lot of wire from the St. Louis Wire Mill Company. One hundred eighty-five coils, which, with the freight added, were of the value of \$869.50, were shipped by the Wire Mill Company, consigned to The Acme Fence Company at Trinidad, Colorado. A draft was drawn for the amount by the shipper upon the consignee, which remained in the hands of the bankers for collection until March 9, 1891.

The wire remained in the car and in possession of the railroad company until that date, and demurrage was charged by the railroad company, amounting to \$105. Charles Springer (appellant) was a member of The Acme Fence Company. The company was embarrassed, had no money. On that date Springer advanced the money and took up the draft. Harry Wigham, vice president and treasurer of the Acme corporation, went to Trinidad, and with money furnished by Springer paid the \$105 demurrage and had the wire stored in the warehouse of The Brown-Nanzanars Company, where it remained. Subsequently The Brown-Nanzanars Company was succeeded by The Forbes Mercantile Company in the same building, and the wire remained in its custody.

The Acme Company still being embarrassed, and indebted to Springer for money advanced, including the amount paid for the wire in store, in the sum of \$6,223.39, Springer brought suit against it and obtained a judgment for that sum. The judgment remaining unpaid, The Acme Company, on the 23d day of May, 1891, conveyed to Springer all its property and assets, specifically including the wire in store; such conveyance and sale to become absolute if the company failed to pay and redeem within fifteen days. The company failed to pay within the time specified.

Appellee was sheriff of Las Animas county. On August 27, 1891, The Trinidad Water Works Company and P. J. McMartin commenced suit in Las Animas county by attachments against The Acme Fence Company, which were levied upon the wire in store, and afterwards judgments were obtained, and appellee as sheriff was proceeding to sell the wire in satisfaction, when appellant brought this suit in replevin and took the property. The trial was had to the court without a jury, the only question tried being the title to the wire. The other facts were covered by stipulation. The court found for the defendant (appellee), and the plaintiff prosecuted an appeal to this court.

Except the general assignment that the court erred in finding for the defendant, the only errors assigned are the admis-

sions by the court of the evidence of Forbes, president of The Forbes Mercantile Company, successor to The Brown-Nanzanares Company, of conversations with the officers of the latter company in regard to the ownership of the wire in store at the time of the transfer, and the admission in evidence of the books of the Forbes Company to show how it was held by it and in whose name as owner; the testimony establishing the fact that the wire was stored in the name of The Acme Fence Company with The Brown-Nanzanares Company, and as such was transferred to and held by its successor, the Forbes Company.

It was contended upon the trial and is urged in argument that appellant acquired title to the wire in March by payment of the draft of the St. Louis Company, the payment of demurrage and the acts of Wigham, vice president and treasurer of the Acme Company. Such contention cannot prevail. The goods were ordered by and consigned to the Acme Company, the draft for the purchase and freight was drawn upon the company. The company was embarrassed; the draft remained three or four months unpaid in the hands of the collecting agents, while the goods remained in store or possession of the railroad company, accumulating demurrage charges. At this point appellant came forward, took up the draft upon the company, paid the demurrage, and the goods were placed in store by Wigham, the vice president and treasurer. As to whether or not the goods were stored in the name of appellant, the evidence is unsatisfactory. Wigham testifies that they were, while the warehouse books show they were not. No warehouse receipt was taken in the name of appellant. But we deem this inquiry unimportant. It is said in argument "that plaintiff, after some delay, paid said draft upon an agreement that said wire should be taken and held by plaintiff until he was repaid the amount of the draft." We can find no such agreement in the evidence of record. If such agreement was made, it was of no legal significance to third parties who had no notice of it. The money appears to have been advanced like other moneys to the company,

paid to and disbursed by the executive officer of the company in its business. No corporate action was taken, no transfer of the goods made. Appellant could not, by the voluntary advance of money and instructions to Wigham, change the ownership. One man cannot make a bargain of sale of the property of another to himself; and even had Wigham directed the goods to be stored in the name of appellant, without further evidence of change of ownership, the warehousemen were justified in disregarding it. That he did not, by any act of the corporation, become the owner of the goods until about the 7th of June is shown by the conveyance, subject to defeasance by payment within fifteen days, made on the 23d of May. Prior to that time the transactions appear to have been confined to money advanced the company, until it aggregated over \$6,000. After default in payment and the expiration of fifteen days, appellant might have become the legal owner by reducing the goods to his possession. Had there been a warehouse receipt, constructive possession could have been effected by its transfer with notice to warehousemen, without a receipt, by the exhibition of his title and a transfer upon the books of the warehouse. Neither was done. Taking the testimony of appellant as to what was done to change the possession, all we can find is the following: "I came here to Trinidad on my way to Catskill in June, shortly after the fifteen days had expired, as mentioned in that bill of sale, and inquired from a clerk in Brown-Nanzanar's establishment about this wire, and I told him I would soon want the wire shipped to my factory at Catskill and that I would then pay the charges on it."

Sec. 14 of our Statute of Frauds is as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making

such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive."

In regard to the construction and effect of this section, as said by ELBERT, C. J., in *Cook v. Mann*, 6 Colo. 21, "the books are full of decisions." In that case it was said: "The vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands and that the title has passed out of the seller and into the purchaser. When the subject of the sale does not reasonably admit of an actual delivery, it is sufficient if the vendee assume the control and dominion of the property, so as reasonably to indicate, to all concerned, the change of ownership."

That the decision has since been followed, see *Wilcox v. Jackson*, 7 Colo. 521; *Bassinger v. Spangler*, 9 Colo. 175; *Sweeney v. Coe*, 12 Colo. 485; *Herr v. Denver, M. & M. Co.*, 13 Colo. 406; *Atchison v. Graham*, 14 Colo. 217; *Felt v. Cleghorn*, 2 Colo. App. 4.

It is clear, even from the evidence of appellant, that there was no change of possession either actual or constructive, nor compliance with the requirements of the statute before the levying of the attachments, and as to creditors the sale was void.

The evidence of Forbes, president of The Forbes Mercantile Company, in whose possession the goods were, also the books of the concern, were admissible in evidence upon the trial. The question being tried was whether an actual change of possession of the goods as required by statute had taken place, and, though perhaps not conclusive, the testimony was competent to show whether or not there had been a change of the possession.

The judgment must be affirmed.

Affirmed.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY
OF FREMONT, APPELLANT, v. WILSON, APPELLEE.

1. COSTS.

The right to reimbursement for costs expended is statutory. In the absence of statute it does not exist.

2. COSTS IN CRIMINAL CASES.

Costs of the prosecution are recoverable of a defendant upon conviction of a crime.

3. SAME.

The county is liable for the costs of prosecution in a criminal case where the defendant is acquitted.

4. SAME.

In case of the conviction of a defendant and of his inability to pay the costs, the county is liable for the costs of prosecution.

5. SAME.

There is no liability against the county on account of services rendered by officers or witnesses on behalf of a defendant in a criminal case, unless he has availed himself of the provisions of the statute by obtaining an order of the court or judge that such witnesses be subpoenaed.

Appeal from the District Court of Fremont County.

Messrs. WALDO & DAWSON, for appellant.

Mr. S. P. DALE, for appellee.

THOMSON, J., delivered the opinion of the court.

At a regular session of the Board of County Commissioners of the county of Fremont, John Wilson, who was clerk of the district court in and for that county, presented certain bills to the board, for fees due him as clerk for official services in behalf of defendants in certain criminal cases tried in his court. A portion of these bills, aggregating \$118.75, were disallowed by the board of commissioners, and Wilson appealed to the district court. The case was heard in the district court upon the following agreed statement of facts:—

“It is hereby stipulated and agreed by and between the above named parties to this appeal that the following are the facts upon which this cause shall be submitted for the decision of said court, to wit:

“That at the regular session of the Board of County Commissioners of said county of Fremont, in said state of Colorado, held in January, A. D. 1892, certain bills were presented to said board by the appellant above named, who is, and then was, the clerk of the district court of the Eleventh Judicial District of the state of Colorado, in and for said county of Fremont.

“That said bills were presented in all respects in accordance with all of the provisions of law in regard to the presentment of such bills.

“That part of the items included in said bills were allowed and paid by said Board of Commissioners, and that other items included in said bills, amounting, in the aggregate, to the sum of one hundred and eighteen dollars and seventy-five cents, (\$118.75), were disallowed by said Board of Commissioners.

“That the items so disallowed were as follows, to wit:

“In case No. 1216, *The People v. R. C. McCoy*, Ind. for murder. Defendant's clerk's costs at and prior to Oct. term, 1889, the time of the first trial, and for which no bill of same has heretofore been presented:

April, 1889, entering appearance of 4 attorneys,	
at 20 c.	\$.80
Oct., 1889, issuing 31 subpoenas for Oct., 1889,	
60 c.	18.60
Filing 47 papers, at 12½ c.	5.87
Affidavit for <i>habeas corpus</i> and filing same . . . . .	.25
Issuing <i>habeas corpus</i> and filing same	1.12
Swearing 35 witnesses at 12½ c.	4.37
62 witnesses' affidavits and filing the same, at 25 c.	15.50
62 witnesses' certificates, at 75 c.	46.50
	<hr/>
	\$93.01

“In same case at October term, 1891, defendant's costs:

Filing two papers (not subpoenas)	. . .	\$.25
6 affidavits and filings for defendant	. . .	1.50
Oath to Elizor and filing same	. . .	.25
3 witnesses' affidavits, at 15 c.	. . .	.45
3 witnesses' certificates, at 15 c.	. . .	.45
Other items which cannot now be certainly separated from the bill	. . . . .	1.97
		<hr/>
		\$4.87

“*People v. Kasper Schaeferhoff*, No. 1340, indictment for assault with intent to kill and murder. Fees at October term, 1891:

Entering appearance of attorney	. . .	\$.20
Swearing 4 witnesses, at 12½ c.	. . .	.50
Issuing 3 subpoenas, at 60 c.	. . .	1.80
8 witnesses' affidavits and filing, at 15 c.	. . .	1.20
8 witnesses' certificates, at 15 c.	. . .	1.20
Filing 4 papers for def't, at 12½ c.	. . .	.50
		<hr/>
		\$5.40

“*People v. Frank Salvo*, No. 1341, murder. Defendant's costs not in court order, Oct., 1891:

Entering appearance of attorneys	. . .	\$.20
Affidavits, certificates and swearing 2 witnesses not ordered by court, 15 c., 15 c. and 12½ c. each	. . . . .	.84
Some other items not now distinguishable	. . .	.16
		<hr/>
		\$1.20

“*People v. Ben Boyer*, No. 1318, murder. Defendant's costs, October term, 1891:

Entering appearance of attorneys, at 20 c.	. . .	\$.40
Filing 15 papers for def't, at 12½ c.	. . .	1.87
Issuing 12 subpoenas, at 60 c.	. . .	7.20
Certificates for 16 witnesses, for def't, 15 c.	. . .	2.40
		<hr/>
Amount carried forward	. . . . .	\$11.87

Amount brought forward	\$11.87
Affidavits and filings for 16 witnesses for def't, 15 c.	2.40
	<hr/>
	\$14.27

“Summary of disallowed costs :

<i>People v. Richard C. McCoy</i>	\$97.88
<i>People v. Kasper Schaeferhoff</i>	5.40
<i>People v. Frank Salvo</i>	1.20
<i>People v. Ben Boyer</i>	14.27
	<hr/>
Total	\$118.75

“That the services were rendered by said clerk for said defendants as above charged for, at the request of said defendants, and that the several amounts charged are entirely unobjectionable.

“That said defendants, Richard C. McCoy, Kasper Shaeferhoff and Frank Salvo, and each of them, were, at said October term, A. D. 1891, convicted, and that in each and all of said cases it was made to appear in a lawful manner that said defendants and each of them were unable to pay costs, or any part of said costs ; and that, at the same term of said court, said defendant, Ben Boyer, was acquitted.

“That, in said cases of McCoy and Salvo, application was regularly made to the court, under the provisions of section 1001 of the General Statutes of the state of Colorado (sec. 1507 Mills' Annotated Statutes), and under the provisions of section 5 of an act of the general assembly of the state of Colorado, entitled ‘An act to amend sections 65, 123, 133, 197 and 313 of chapter XXV. (the same being general sections 753, 811, 827 and 1001) of the General Statutes of the state of Colorado, entitled “Criminal Code,”’ approved April 9, 1891, and in force on that day (Laws 1891, p. 126), for orders that certain witnesses be subpoenaed, if found within the limits specified in said statutes ; but that all fees of said clerk incurred by the process for such witnesses and all fees incurred in connection with such witnesses so sub-

poenaed in accordance with such orders have been paid and are not included in the fees disallowed as aforesaid; and that said fees disallowed as aforesaid (including the amounts above stated to be not separable from other items in the bills), amounting to the sum of \$99.08, are costs for the payment of which no order has ever been made by said court or by the judge thereof.

“That in the cases of said Shaeferhoff and Boyer no application was ever made to said court or to the judge thereof for any order directing that any witness or witnesses be subpoenaed, and that no such order was ever made, and that the \$5.40 in the Schaeferhoff case, and the \$14.27 in the Boyer case, are costs of said defendants for whose payment no order of said court was made.

“That the only objection to the payment of said costs so disallowed, as aforesaid, and every part thereof, is that in the absence of such previous orders of court, made under the statutes above cited, no law of the state of Colorado requires them to be paid by said Fremont county or by its Board of County Commissioners; wherefore, on said facts, the opinion of this court as to whether or not said laws require the payment of said costs by said county, is prayed.”

Upon the hearing the court reversed the action of the commissioners and gave judgment to the plaintiff for the amount of his claim. The board brings the case here by appeal.

The plaintiff bases his right to judgment on section 699, Mills' Ann. Stat. (Session Laws 1889, p. 100). That section, in so far as it affects this controversy, reads as follows: “The costs in criminal cases shall be paid by the county in which the offense was committed, when the defendant shall be convicted and shall be unable to pay them; when the defendant is acquitted the costs shall be paid by the county in which the offense was committed, unless the prosecuting witness be adjudged to pay them.” If the term “costs,” as used in that section, be construed to mean the entire costs incurred, both for the prosecution and the defense in a case, the plaintiff's contention must prevail, and judgment was

properly and rightfully rendered in his favor by the district court; but if, on the other hand, the term, as used, refers only to the costs incurred by the people in the prosecution, then the judgment is erroneous and must be reversed.

The language itself is indefinite; the word "costs" is not qualified or limited by any other language in the section, so as to clearly indicate the legislative intent; and if the section stood alone, if there were no other legislation affecting its subject-matter, there might be some difficulty in arriving at a satisfactory conclusion as to its meaning. At common law there was no recovery of costs either in civil or criminal cases. In civil suits, each party to the controversy paid his own expenses. In criminal causes, the costs made by the defendant, whether he was convicted or acquitted, if paid at all, were paid by him; the costs of the prosecution, no matter what the event of the trial, were unpaid. On the part of the state or sovereign there was neither payment nor recovery of costs. The right to reimbursement for costs expended is therefore purely statutory. Without a statute giving it, it does not exist. *Board of Com'rs Larimer Co. v. Lee, ante*, 177.

Such statute was embraced in the Criminal Code of 1861, whereby it was provided that in cases of persons convicted of crimes or misdemeanors therein specified, or at common law, the judgment should be that the offenders convicted should pay the costs of prosecution, and that a lien should be created upon the property real and personal, then owned or subsequently acquired by the offenders, to the amount of the costs, and of the fines if any, which costs and fines were to be collected by execution. Mills' Ann. Stat., sections 1471, 1472 (Gen. Stat. 1883, sections 964, 965). This statute has ever since been and now is in force; and in authorizing a recovery by the people against a convicted defendant of the costs incurred to secure his conviction, it was a departure from the doctrine of the common law. Still this statute did not assure the payment of such costs. Whether they were collected or not, depended upon the solvency of the defend-

ant. If he failed to pay them, and had no property out of which they could be made, they remained of course unpaid. If the defendant was acquitted, there was no legal obligation anywhere to pay them, and they were never paid. Until the enactment in 1876 of section 699, which we have quoted, there was no provision whereby, in case of a convicted defendant, who was insolvent, or of a defendant who was acquitted, the witnesses for the people, or the officers of the court, were entitled to receive any pay for their services in behalf of the prosecution. There is not, and never has been, any statutory enactment providing for the recovery of costs by a defendant in a criminal case. The only costs for which judgment may be had are the costs of the prosecution, and then only when there is a conviction. As in case of acquittal no costs were paid, and in case of conviction the realization of the costs was necessarily involved in great uncertainty, being dependent upon the solvency of the defendant, it occurs to us, without looking farther, that section 699 was enacted to supply a want which the legislature conceived to exist in the law as it then stood, by making provision for the payment of the costs of prosecution, notwithstanding the defendant might be acquitted or insolvent. It will be observed that it is only in case of the conviction of the defendant and his inability to pay the costs, or of his acquittal, that they are made a charge against the county; so that there is no difficulty in supposing that the costs referred to are the costs incurred by the prosecution, and which, by the terms of section 1471, would in case of conviction be recovered by the people; and not the costs made by the defendant. The mere fact that the term "costs" is used generally, without particularization, proves nothing in either direction. The section will naturally and easily bear such interpretation as we have indicated. A construction of a legislative enactment similar to the one we have been considering, was given by the supreme court of Pennsylvania in *Williams v. Northumberland County*, 110 Pa. St. 48. The act provided "that the costs of prosecution accruing on all bills of indictment, charging

a party with felony, ignored by the grand jury, shall be paid by the county; and in all cases of conviction of any felony, all costs shall be paid forthwith by the county, unless the party convicted shall pay the same; and in all cases in which the county pays the costs, it shall have power to levy and collect the same from the party convicted, as costs in similar cases are now collectible." The court held that that statute created no liability against the county on account of defendant's costs.

The legislature of Wisconsin enacted a law as follows: "When any prosecution instituted in the name of this state, for breaking any law of this state, shall fail, or when the defendant shall prove insolvent, or escape, or be unable to pay the fees when convicted, the fees shall be paid out of the county treasury, unless otherwise ordered by the court; provided that no fees shall be paid out of the county treasury for mileage to the district attorney."

Under the provisions of that act it was sought to compel payment by the county of the fees of defendant's witnesses in a criminal prosecution in which he was acquitted. In deciding the question, the supreme court say: "In the Revised Territorial Statutes of 1839, we find not only the section under consideration, but also a provision that in all criminal prosecutions where judgment should be rendered against the defendant, he should be liable for costs; also that the district attorney should have certain fees for mileage; that fines recovered and collected should be paid into the county or territorial treasury; but no provisions respecting the payment of costs collected into the public treasury. The section in the territorial statute was in harmony with the other provisions; and the system there established was, that in criminal prosecutions, if the defendant was convicted, judgment was rendered against him for the costs of the prosecution; and these costs, if collected, were paid by the officer receiving them to the various officers or persons whose fees or charges made up the items for which the judgment was rendered; or if the county, previous to collection, had paid any of these

fees, then such fees were to be paid into the county treasury. But if defendant was unable to pay, or proved insolvent, or escaped, or the prosecution failed, then the fees were to be paid from the county treasury. What fees? Obviously the same that would have been taxed against defendant if he had been convicted—the fees of the prosecution. And this, we think, is the construction this section of the Revised Statutes of 1858 must receive.” *Hutt v. Winnebago County*, 19 Wis. 128.

But there has been other legislation in this state upon the same subject, which affords further aid in ascertaining the purpose of section 699, and therefore its meaning. Section 1507, p. 1000, Mills’ Ann. Stat. (Gen. Stat. 1883, § 1001), reads as follows:—“Whenever any person indicted in a court of the state of Colorado shall make affidavit setting forth that there are witnesses whose evidence is material to his defense; that he cannot proceed to trial without them; what he expects to prove by each of them; that they are within the judicial district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses—the court in term, or the judge thereof in vacation, if it appears to said court or the judge thereof that the evidence of such witnesses would be material in the trial of the cause, may order that such witnesses be subpoenaed, if found within the limits aforesaid. In such case, the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the people.”

This latter section was enacted on the 7th of February, 1876. The date of the passage of section 699 was February 11, 1876, just four days afterwards. If we construe section 699 as including the costs of defendant, section 1507 is a useless piece of legislation. It permits nothing to be done in behalf of the defendant which cannot be done equally well under the provisions of section 699. In case of conviction

and his inability to pay, his costs are absolutely payable by the county, and, in case of acquittal, by the county or prosecuting witnesses. By the terms of section 1507 the costs incurred by him are paid in the same manner; and section 16 of the bill of rights guarantees process to compel the attendance of witnesses in his behalf. Section 699 was enacted subsequently to the other section; there is no such inconsistency between the two as to justify the court in saying that the former repealed the latter by implication; the latter is not expressly repealed, and therefore it remains a law, but a law which serves no purpose. If the legislature intended that it should be superseded and rendered nugatory, it surely would have expressed such intention either by words of repeal, or by language which would clearly indicate that purpose. On the 9th day of April, 1891, the section in question was amended (Session Laws 1891, p. 186). The only change made by the amendment was a slight alteration in the phraseology of the affidavit required, the law being otherwise unaffected; and the fact that it was amended is conclusive that the legislature did not regard it as useless law, or as superseded by section 699; but that on the contrary it was considered as a law in force and effective for the purpose for which it was enacted.

The provisions of section 1507 are wise and beneficent. They extend ample protection to an indigent defendant. They afford him every facility for making a legitimate defense, and at the same time provide safeguards against the imposition of unnecessary burdens upon the public; while section 699, if the construction contended for should be adopted, would sweep away every restriction, and enable an offender, in a useless and unavailing defense, to pile up costs *ad libitum* for the county to pay, and thus impose upon its people an unnecessary and oppressive burden.

Such was not in our view the intention of the legislature. We are clearly of the opinion that there is no statute in this state creating any liability against a county on account of services rendered by officers or witnesses in behalf of a de-

fendant in a criminal case, unless the defendant has availed himself of the provisions of section 1507 ; and that section 699 provides for the costs of the prosecution only.

The judgment will be reversed.

Reversed.

SAULT, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE
STATE OF COLORADO, DEFENDANTS IN ERROR.

1. CRIMINAL LAW—INFORMATION.

It is the right of a defendant in a criminal case to be informed of the charges against him as fully as it is in the power of the prosecution to inform him, so that he may be enabled to intelligently prepare his defense.

2. SAME.

Where a party is charged with larceny, the name of the person from whom the property was stolen; where with murder, the name of the person killed; where with receiving stolen goods, the name of the owner of the goods and the person from whom they were received,—must be set out in the indictment or information; and only the inability to secure such names will excuse the failure to give them.

3. SAME—PRACTICE.

Where an information charges a defendant with receiving stolen goods from some person to the district attorney unknown, and where it appears from the evidence at the trial that at the time of the preparation of the information, the name of such person was known to the district attorney, the defendant is entitled to his discharge.

Error to the District Court of Arapahoe County.

Mr. ROBERT W. BONYNGE and Mr. THOMAS WARD, for plaintiff in error.

Mr. EUGENE ENGLE, attorney general, and Mr. H. B. BABB, of counsel, for the people.

THOMSON, J., delivered the opinion of the court.

Samuel H. Sault, plaintiff in error, was convicted of re-

ceiving stolen goods. The information upon which he was tried charges that he received the property from some person to the district attorney unknown. The principal witness for the prosecution was one Charles Edwards, who swore that he stole the goods and sold them to the defendant, Sault. He also testified that, before the information was drawn, he was in the office of the district attorney, and told him that he had stolen the goods and sold them to Sault—that he made this statement to Col. Dennison. The record shows that Dennison was the deputy district attorney who verified the information. There was no other evidence on that point in the case made by the prosecution.

At the close of the case for the people, counsel for defendant, Sault, moved the court to discharge the defendant, for the reason that the information charged that the goods were received by Sault from some person to the district attorney unknown; whereas the testimony showed that at the time the information was prepared the name of the person from whom the goods were received was known to the district attorney. The motion was denied. This was error.

“As it is required, in indictments, that the names of the persons injured, and of all others whose existence is legally essential to the charge, be set forth, if known, it is, of course, material that they be precisely proved as laid. Thus the name of the legal owner, general or special, of the goods stolen or intended to be stolen, must be alleged and proven. And if the person be described as one whose name is to the jurors unknown, and it be proven that he was known, the variance is fatal, and the person will be acquitted.” 3 Greenl. on Ev. § 22.

“Where a third person cannot be described by name, it is enough to charge him as a certain person to the jurors aforesaid unknown, which, as will presently be seen, is correct, if the party was at the time of the indictment unknown to the grand jury, though he became known afterwards. * * * But if the third party's name be known to the grand jury, or could have been known by inquiry of witnesses at hand, the allega-

tion will be improper, and the defendant must be acquitted on that indictment, though he may be afterwards tried upon a new one, in which the mistake is corrected." Wharton's Crim. Pl. & Pr. §§ 111, 112.

"When a third person is described as a person to the grand jurors unknown, and it turns out that he was known to the grand jurors, the variance is fatal." Wharton's Crim. Ev. § 97.

Where the name of such third person, even if unknown, might have been ascertained by the use of reasonable diligence, the effect is the same as if the name was actually known. *Jorasco v. The State*, 6 Tex. App. 238.

The rule laid down by the authorities is not a mere arbitrary one. It is the right of a defendant in a criminal case to be informed of the charges against him as fully as it is in the power of the prosecution to inform him, so that he may be enabled intelligently to prepare his defense. Where he is charged with larceny, the name of the person from whom the property was stolen; where with murder, the name of the person killed; where with receiving stolen goods, the name of the owner of the goods, and of the person from whom they were received,—must be set out in the indictment or information, and only the inability to ascertain such names will excuse the failure to give them. See also, *State v. Perkins*, 45 Tex. 10; *State v. Beattie*, Phillips (N. C.) 52.

The motion should have been sustained and the defendant discharged.

The judgment will be reversed.

Reversed.

FAUST ET AL., PLAINTIFFS IN ERROR, v. SMITH, DEFENDANT IN ERROR.

1. PLEADING.

A complaint in an action against a firm, which alleges a distinct and independent indebtedness against each member thereof, does not state a cause of action.

2. PLEADING—JOINDER OF CAUSES OF ACTION.

Several causes of action which do not affect the parties in the same character and capacity may not be united in the same complaint.

Error to the County Court of Phillips County.

Messrs. BARTELS & BLOOD and Mr. W. D. KELSEY, for plaintiffs in error.

Mr. J. S. BENNETT and Mr. P. J. DEMPSTER, for defendant in error.

THOMSON, J., delivered the opinion of the court.

Frank M. Smith brought his action in the court below against William H. Faust and Mahlon Faust, partners under the firm name and style of the Faust Lumber Company. A writ of attachment was issued in the case, under and in pursuance of which certain moneys due the copartnership were garnished. The cause of action stated in the complaint is an indebtedness from William H. Faust for medical services rendered and medicines furnished to him by the plaintiff, and at his special instance and request, and an indebtedness from Mahlon Faust for medical services rendered and medicines furnished to him by plaintiff, and at his special instance and request. The defendants demurred to the complaint, for the following among other reasons: First, that the complaint did not state facts sufficient to constitute a cause of action; and, second, that several causes of action were improperly united in the complaint. The demurrer was overruled, and judg-

ment given against each defendant for the amount of plaintiff's claim against him. The defendants bring the case here by writ of error.

The plaintiff's theory of his case is not obvious. Whether it was intended as a suit against the copartnership, or as a suit against the individual defendants, does not very clearly appear from the record. The cause is entitled against the firm. The summons is directed to the copartnership by its firm name, and the writ of attachment commands the sheriff to attach the property of the firm, while the complaint alleges a distinct and independent indebtedness against each member of the firm. If we consider this as a suit against the firm, then no cause of action is stated in the complaint, because the indebtedness it sets forth is not a partnership indebtedness. If, on the other hand, we regard it as a suit against the individual defendants, then several causes of action are improperly united. Section 70 of the Civil Code permits certain causes of action to be united in a complaint, but they must affect the parties in the same character and capacity. Here a claim is made against each defendant, with which the other has no connection, direct or remote, and by which he is not affected in any character or capacity. In either view of the case, the demurrer should have been sustained, and because it was overruled the judgment must be reversed.

Reversed.

GIBSON, APPELLANT, v. GLOVER, APPELLEE.

CAUSE OF ACTION.

An action for dissolution of a partnership and accounting cannot be maintained when it appears that, by the acts of the parties, the partnership relations, if any existed, had been dissolved and an accounting had.

Appeal from the District Court of Washington County.

Mr. L. J. CUPPS, Mr. J. A. BONHAM and Mr. A. J. JOHNSON, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

Appellant, Gibson, brought suit against Glover, appellee, alleging that a partnership had existed in a general mercantile business, conducted by appellant first at Hastings, Nebraska, afterwards at Hyde, Colorado. For the original stock appellant traded real property, or equities in real property. Appellee put in some money. It is alleged that, after the business had been prosecuted for some length of time, appellee took entire possession of the stock, sold it out to third parties, appropriated the proceeds to his own use, and refused to settle and adjust partnership matters. That there was a large balance due plaintiff. Praying for a dissolution of partnership, an accounting and settlement of partnership affairs, and for payment of what might be found due after payment of partnership debts.

Defendant answered, denying all the allegations in the complaint, including that of partnership, and claiming \$2,000 due him from the plaintiff. Trial was had to the court, resulting in a judgment in favor of the defendant and against plaintiff for costs, from which an appeal was prosecuted. The assignment of errors may be summarized in one: That the court erred in finding for the defendant.

The evidence is very conflicting and contradictory, and the abstract and record confused, much of it unintelligible. The principal issue to which evidence was directed seems to have been that of the existence of a partnership, the defendant contending that he never was a partner, and that what he had put in was in the way of advances or loans to the plaintiff, to secure which he had retained the title to the goods, with the right to enter and take possession on failure of payments. The business was conducted in the name of appellant as "manager."

The testimony of the parties was so contradictory that it

would seem impossible to arrive at any solution, while the documentary evidence put in is so indefinite as to furnish no aid.

In view of one fact established, much of the testimony seems to have been immaterial and was probably disregarded by the trial court.

On the 2d day of May, 1887, appellee went to appellant at Hyde, Colorado, at which time it appears a settlement was had between the parties, and appellant made and delivered to appellee a full and complete bill of sale of all the merchandise in the store, and delivered the possession. Such sale was absolute, unequivocal, without any provision for future settlement or the reservation of any subsequent rights or claims. Appellee then sold and delivered the stock to other parties with the full concurrence of appellant. It is asked in the complaint that the court decree a dissolution of the partnership. This seems to have been unnecessary, for if any partnership had before that time existed, it was by the united acts of the parties legally dissolved and closed. The same may be said of the prayer for accounting. An agreement for accounting was had, and the receipt of all dues admitted by appellant. Unless the settlement and written bill of sale were impeached and set aside, the paper executed by appellant was conclusive. It was attempted to be shown by appellant that there was a verbal arrangement nullifying the document, in effect impeaching it and rendering it nugatory. It is very doubtful if any such testimony was admissible without an allegation of fraud in obtaining it. No fraud is alleged, nor was any attempt made to establish fraud upon the trial. If admissible, the evidence was insufficient to establish the plaintiff's contention, hence, the document was conclusive. The complaint asking for dissolution and partnership accounting should have been dismissed. If appellant had any cause of action, it grew out of the settlement to collect the amount agreed to be paid. No such cause of action is disclosed in the complaint.

The judgment must be affirmed.

Affirmed.

McGRANAHAN ET AL., APPELLANTS, v. BARBER ET AL.,
APPELLEES.

APPELLATE PRACTICE.

A decree which is supported by evidence will not be disturbed on the ground of insufficiency of the evidence.

Appeal from the District Court of Gunnison County.

Messrs. GULLETT & BROWN and Messrs. HELM & GOUDY,
for appellants.

Mr. DEXTER T. SAPP, for appellees.

BISSELL, P. J., delivered the opinion of the court.

This was a suit in equity brought to set aside sundry conveyances alleged to be fraudulent as against creditors. The decree was for the defendants. The case as charged substantially is that in November, 1886, one of the defendants, John P. Bassler, was the owner of certain property in and near White Pine, Colorado, consisting of some business property and certain mining claims located in the district contiguous to the town. About that time, Bassler executed sundry conveyances to the Barbers, who were codefendants with him. The plaintiffs' contention concerning those transfers was that they were executed to Bassler's relatives without valuable consideration, and with the intent to delay the collection of debts which Bassler owed. It further appeared at the trial that in the following spring divers parties recovered judgments against Bassler, and that the title to those judgments ultimately vested in McGranahan and Butler, the appellants, who were plaintiffs in this suit. McGranahan and Butler appear to have had dealings with Bassler, and to have become the purchasers of a stock of merchandise, which Bassler owned at the time of the sale, and which the judgment

creditors above referred to sought to subject to the payment of their claims. These creditors were successful, and ultimately recovered judgment against the purchasers, McGranahan and Butler, who were compelled to liquidate these obligations in order to maintain their title to the merchandise which they bought of Bassler. Through this liquidation of those claims came their title to the judgments referred to. The suit was to enforce an equitable lien on the property conveyed to the Barbers. The defense attacked the validity of McGranahan and Butler's title to the judgments, contending that the real person interested was Bassler, who of course would be debarred an attack on his own transfers. Their main contention, however, was that they had acquired title to the property which they held in good faith, and for a valuable consideration which they paid.

A good deal of testimony was offered on both sides, and the finding of the court on the questions in dispute was evidently rendered on very conflicting testimony. The principal question presented to the court is as to the sufficiency of the evidence to support the court's decree. There is nothing else suggested by counsel which would be of sufficient importance to justify the reversal of the case. With this contention that the evidence does not support the finding we have no concern. There was evidence in the case which justified the court in reaching its conclusion, and under these circumstances the well settled rule that appellate courts will not disturb the judgment on the claim that the evidence does not support the decree compels us to affirm the judgment. This rule is too firmly established to need support by the citation of authorities. It has been very rarely deviated from in the history of this state, and there is nothing in the present case to justify a departure from this practice.

There being no errors in the record, the judgment will be affirmed.

Affirmed.

PATTERSON, ET AL., PLAINTIFFS IN ERROR, v. THE BROWN AND CAMPION DITCH COMPANY, DEFENDANT IN ERROR.

1. ESTOPPEL.

A corporation having sold the stock of a shareholder for a delinquent assessment, and bought in the stock itself with his acquiescence, is estopped to charge him with further assessments. It cannot, in such a case, assert the invalidity of its own proceedings and reinstate him as a stockholder.

2. IRRIGATING DITCHES.

While as a fact there may be but one ditch, yet there may be two distinct legal entities therein which have never merged or become identical.

3. SAME.

Where a ditch is enlarged and extended by a new and different set of proprietors, the duty of keeping in repair the headgate and ditch to its original terminus is upon both sets of owners—the expense to be adjusted upon an equitable basis; but beyond this the first set of owners have no interest and no duty.

Error to the County Court of Mesa County.

DEFENDANT in error as plaintiff brought suit before a justice of the peace to recover money alleged to be due upon the assessment of ditch stock for money expended in keeping in repair the ditch of plaintiff.

The defendants below were sued as the owners of 90 $\frac{1}{11}$ shares of the capital stock of the company, and it claimed \$75.00 due as the amount properly chargeable to the stock. The judgment was for the defendants, an appeal taken by the plaintiff to the county court, a trial had by the court resulting in a judgment for the plaintiff.

In the year 1883 Joseph Simineo, Dennis Sullivan, John J. McKay and Daniel W. Collard took out from Kannah creek, for irrigating purposes, a ditch to cover their lands, and called it the Brown and Campion ditch, being three feet in width on the bottom, five feet at water surface, depth of water one foot. The length is not definitely given but it appears to have been quite short.

From the date of its construction until about the year 1887 it so remained, and the water was used by the parties named. On the 16th day of December, 1886, another company was organized and incorporated, taking the name of The Brown and Champion Ditch Company (now defendant in error). It constructed a new headgate for the benefit of all parties a short distance above the headgate of the old Brown and Champion ditch, connected it with such ditch, entered upon it, materially enlarged it throughout its length and extended it by a new ditch for some distance beyond the terminus of the former ditch.

The rights of the owners of the original ditch and water rights were not merged in those of the new company, but remained separate and distinct, entitled to all rights of priority and use of water acquired by their earlier appropriation and application.

Plaintiffs in error as grantees of Joseph Simineo, became the owners of his right in the old ditch and also became shareholders in the new corporation through purchase from Simineo, holding $\frac{1}{4}$ of the stock, amounting to 90 $\frac{1}{4}$ shares. In the year 1890 plaintiffs in error were assessed upon their stock for necessary repairs upon the ditch. A controversy arose, plaintiffs refusing to pay a balance of about \$14.50 alleged to have been due. The company, claiming to act under its by-laws, advertised the stock for sale, and at the time designated caused the stock to be sold for just the amount at that time claimed to be due; it was bid in for the company and a certificate of transfer made to the company. Plaintiffs acquiesced and never afterwards asserted any rights as stockholders or questioned the legality of the proceedings, but the company, according to the testimony of its officers, doubting the validity of its proceedings, disregarded and ignored them, and without reinstating the plaintiffs as stockholders elected to so regard them and hold its own proceedings void. In pursuance of this policy plaintiffs were charged *pro rata* for the cost of keeping the ditch in repair for three or four ensuing years. Plaintiffs failing to pay, this suit was brought to re-

cover such assessments, including the \$14.50 for which the stock was sold.

The court found for the plaintiff (defendant in error), and such judgment is brought here for review.

Mr. CHARLES F. CASWELL, for plaintiffs in error.

Messrs. BUCKLIN, STALEY & SAFLEY, for defendant in error.

REED, J., delivered the opinion of the court.

Upon the trial it was properly held by the court, *inter alia*, that the plaintiff by its own acts was estopped to claim the defendants as stockholders. They not having questioned the validity of the *ex parte* proceedings of the company, but acquiescing in them, it could not assert the illegality of its own proceedings and reinstate the parties as stockholders. This conclusion is eminently correct and needs no support from authorities. But in the findings of the court upon which its judgment was based there was serious error. After finding that on the 29th of November, 1890, the stock of the defendants was sold and passed to the company and defendants ceased to be stockholders, it found *that there was but one ditch, and that defendants by reason of their ownership in the original ditch were liable to assessment to keep the whole system in repair.*

As a physical fact there was but one ditch; legally there were two, two distinct legal entities that had never merged or become identical. See *Nichols v. McIntosh*, 19 Colo.—

By the decree of the district court establishing priorities from Kannah creek it was declared that the Brown and Champion ditch was entitled to priorities Nos. 5 and 8, that priority No. 5 belonged to Joseph Simineo, Dennis Sullivan, John J. McKay and Daniel W. Collard, and was in quantity 8.6 cubic feet of water per second, and that priority No. 8 belonged to defendant in error and other parties, naming them, having a subsequent right to 22 feet per second. No action was taken

consolidating the interests. Both remained separate and distinct, and as far as priority was concerned the new ditch was subservient, not being able to take water only in excess of the prior appropriation.

If there was but one ditch I am at a loss to know why it should be the second instead of the first, and by what process the original became absorbed in the second and lost its identity. The statute provides that, to prevent multiplicity of ditches, when practicable, water shall be carried in a former ditch. This was done here. Repairs upon the new ditch from the terminus of the old were no more legally chargeable to the other proprietors than the putting in and harvesting a crop. The keeping the headgate and ditch to its original terminus in repair was the duty of both sets of owners, the expense to be adjusted upon an equitable basis; beyond this the first proprietors had no interest and owed no duty. The error of the court was in not regarding the enterprises as two separate and distinct legal entities, with only an interest in common to the extent of the original ditch for the purpose of repair. The right to levy assessments by the defendant in error could only, if at all, be legally predicated upon ownership of stock. When plaintiffs by act of the company ceased to be stockholders, neither they nor their associates in the original ditch by reason of such ownership could in any way be made liable for repairs beyond the limits of the ditch as originally constructed.

If plaintiffs and associates failed to contribute their proper proportion to maintain the ditch from the head to the original terminus, no doubt an action for contribution would lie; beyond that they owe no duty legal or equitable.

Several errors are assigned and are discussed in briefs and arguments of counsel which we do not find it necessary to determine. The error of the court in regard to the legal *status* of the parties and property is sufficient to warrant a reversal.

The judgment of the court will be reversed, and cause remanded for a new trial upon the basis above indicated.

Reversed.

WOODS, PLAINTIFF IN ERROR, v. TANQUARY ET AL., DEFENDANTS IN ERROR.

3	515
6	497

1. JURY—SPECIAL PRACTICE IN CERTAIN COUNTIES.

Either party to an action pending in the county court of a county of the first class is entitled to a trial by jury without advancing the fees therefor.

2. ACTIONS ON OBLIGATIONS BEFORE MATURITY.

The general rule that the maturity of the obligation is as essential as the existence of the debt to enable the plaintiff to bring suit, must control his right to recover, unless the case be brought within the statute permitting suit on an unmatured debt.

3. PRACTICE IN ATTACHMENT.

There must be a finding of the facts alleged as the basis of the attachment, and a formal entry declaring them to exist, in order to entitle the plaintiff to judgment for a debt not due.

4. JURY TRIAL.

The issue formed by the traverse of the grounds of the attachment must be tried by jury, unless that mode of trial be waived by the parties.

Error to the County Court of Arapahoe County.

Mr. JOHN F. TOURTELOTTE and Mr. W. T. HUGHES, for plaintiff in error.

Mr. N. Q. TANQUARY, for defendants in error.

BISSELL, P. J., delivered the opinion of the court.

On the 1st of September, 1891, Tanquary and Gibson commenced this action against Woods, the plaintiff in error, to recover some seventeen hundred dollars. The debt was evidenced by fourteen promissory notes, all dated the 29th of December, 1890, and due at varying periods from six to nineteen months after date. When the suit was started, only three notes of one hundred dollars each had matured, though a fourth which fell due on the 29th of September had reached its maturity, except as concerned the days of grace. To obviate the objection of the nonmaturity of the paper, the

[illegible]

PLAINTIFF IN ERROR, v. TANQUARY & ALL THE DEFENDANTS IN ERROR.

SPECIAL PRACTICE IN CERTAIN COUNTIES.

erty to an action pending in the county court of a county of the class is entitled to a trial by jury without advancing the fees for.

SUITS ON OBLIGATIONS BEFORE MATURITY.

ral rule that the maturity of the obligation is an essential circumstance of the debt to enable the plaintiff to bring suit, except of his right to recover, unless the case is otherwise within the rule permitting suit on an unmatured debt.

WRIT OF HABEAS CORPUS IN ATTACHMENT.

st be a finding of the facts alleged in the writ of the attachment, and a formal entry declaring them to be true, in order to entitle the plaintiff to judgment for a debt not due.

TRIAL.

formed by the traverse of the grounds of the attachment must be by jury, unless that mode of trial is waived by the parties.

Error to the County Court of Arkansas County.

JOHN F. TOURTELOTTE and M. W. I. HUGHES, for plaintiff in error.

Q. TANQUARY, for defendants in error.

LL, P. J., delivered the opinion of the court.

On the 1st of September, 1881, Tanquary and Gibson commenced this action against Woods, the plaintiff in error, for some seven hundred and fifty dollars.

plaintiffs, as to each unmatured obligation, alleged a fraudulent transfer of property, and fraud in the contraction of the debt. At the time the complaint was filed, the plaintiffs sued out an attachment, and observed the statute by filing an affidavit which set up the fraud charged in the complaint, and stated that the action was brought upon a contract for the direct payment of money, and on certain promissory notes. The defendant traversed the attachment. He also answered, denying the allegations of the complaint, and set up some affirmative matter which need not be noticed. Without further stating the history of the cause, it is sufficient to say that on the 7th of December, 1891, the case stood on the docket of the county court on the traverse and the issue formed by the pleadings, when the court set the case for trial for the 21st of December, 1891. When the case was called in its regular order, the defendant demanded a jury to try the attachment issues. This the court denied, on the assigned grounds that a jury had not been asked for prior to the day of trial, and the fees were not advanced to pay for one. The trial proceeding, the defendant waived a jury as to the main issue and the court heard the evidence, and according to the language of the entry found "the issues herein joined for said plaintiffs, and assessed their damages in the sum of sixteen hundred dollars, wherefore it is ordered, etc., * * * that plaintiffs have and recover of, etc., the sum of, etc." This is the only entry in the record, and it contains no finding or judgment concerning the alleged grounds for attachment. The defendant assigns error, and contends the plaintiffs were not entitled to judgment without both proofs and finding as to the alleged ground for complaint.

Manifestly the error is well laid. As a general proposition, the maturity of the obligation is as essential as the existence of the debt, to entitle the plaintiff to bring his suit. This general principle must control the plaintiff's right to recover, unless the case be brought within the scope of that statute which permits a plaintiff to bring suit on an unmatured debt. Chapter 6 of the Code of 1887 is the one which authorizes a

writ of attachment to issue and prescribes the steps which plaintiff must take to secure it. The section which relates to unmatured claims provides that wherever the affidavit states any of the causes save four which authorize the issue of the writ the action may be commenced, and the writ issued upon a debt not due. The judgment entered must be with a rebatement of the interest. A subsequent section permits the defendant to traverse the affidavit, and put in issue the matters alleged, and then enacts that, if the plaintiff substantiate any one of the causes alleged, the attachment shall be sustained. It also provides that if he fail to substantiate any cause, the attachment shall be dissolved, and the action shall be dismissed if the debt be not due. It likewise directs the trial of the issue by jury, unless that method of trial be waived by the parties.

The act of 1891 concerning jurors (Session Laws of 1891, page 248) enacts that, in any action pending before a county court in a county of the first class, either party shall be entitled to a jury without advancing the fees therefor.

These statutory requirements easily dispose of this case. The affidavit which was filed to secure the writ has been subjected to some criticism; but the regularity and form of it need not be considered, since it certainly charges that fraud which authorizes a plaintiff to commence a suit on unmatured paper, and all technical defects in affidavits of this sort are the subject of amendment, if they are aptly and promptly attacked. The decision is very safely rested on the indisputable basis, that there must be a finding, either by a court or by a jury, of the facts alleged as the basis of the attachment, and a formal entry declaring them to exist, in order to entitle the plaintiff to a judgment on his unmatured paper. So far as can be discovered by the record, the traverse of the attachment was never disposed of, and there was at no time during the trial of the case a finding on the issue which it made concerning the existence of the fraud alleged. The matter seems not to have been considered by the court, or if it was he made no further finding or entry concerning it; lacking

these a subsequent judgment is evidently not justified. The reason of the omission would seem to be evident from the manifest failure of the plaintiffs to offer evidence which sustained their charge of a fraudulent disposition of the property. The plaintiffs' evidence having been read, it is impossible therefrom to deduce a conclusion which would justify an affirmative finding on this question. Since this is true, this court is unable to disregard the omission, and on the presumptions arising from the entry sustain the judgment.

When the court denied the defendant a jury to try the issue made by the traverse, he committed an error equally fatal to the recovery. We have adjudged a finding upon this subject indispensable, and, as the statute gives the defendant the right to the determination of a jury on this question, it must be error to refuse it unless a valid statutory reason can be assigned therefor. We can discover none. It is insisted in argument that it is legitimate for the court to require that a defendant shall advance the fees as a condition precedent to this mode of trial, and that the court has full power to provide by its rules that the request for a jury shall precede the day fixed for the trial. The first proposition is disposed of by the statute of 1891 and the attachment act in the Code. The first provides that, in county courts in counties of the first class, either party shall be entitled to a jury without the prepayment of fees; the second enacts that the issue formed by the traverse shall be tried by a jury, unless that mode of trial be waived by the parties. The record discloses not a waiver, but an affirmative demand for a jury. The failure of the court to concede this right to the defendant is necessarily a fatal error, unless it was incumbent upon the defendant to make his demand at some earlier date. We do not decide whether the court could by rule provide the time within which the demand should be made or otherwise the demanding party be precluded. It is enough in this case to say that the record contains no rule of court and shows no practice requiring the defendant to make the demand at an

earlier day. We must therefore assume that his request was in due time, and that its refusal was error.

Because of these errors committed by the trial court in respect of the entry of judgment and the mode of trial, the judgment will be reversed and remanded for further proceedings in conformity with this opinion.

Reversed.

HANLIN, APPELLANT, v. WALTERS, APPELLEE.

1. BOARDING HOUSE KEEPER'S LIEN.

A boarding house keeper has no lien upon the baggage of his guest, or right to hold the same to secure the payment of a demand, except for board and lodging.

2. EMPLOYER AND EMPLOYEE.

Where the contract of employment involved an advancement by the employer of certain expenses to be incurred by the employee, which should be repaid by the work of the employee, the employer is bound to permit it to be repaid in that manner, and if he permits the employee to be involuntarily driven from the service by the violence of a co-employee, it may be held that the debt has been extinguished.

Appeal from the County Court of Pueblo County.

Messrs. DIXON & DIXON, for appellant.

Messrs. DEASY & HIGGINS, for appellee.

THOMSON, J., delivered the opinion of the court.

This is replevin, brought by Florence Walters against James Hanlin. The defense was lien for an unpaid board bill. Plaintiff had judgment, and defendant appeals. The facts are these: The defendant was the manager of the Standard Theater in Pueblo. He testifies that he was also an inn keeper and a boarding house keeper. He engaged the

plaintiff in Kansas City, Missouri, to work in his theater, furnished her with transportation to Pueblo, and some cash for other purposes, amounting in all to \$58.40. She boarded and lodged at his boarding house, and four days after her arrival commenced work in the theater as "forepart woman." Defendant's wife was also connected with the theater, under her husband, in some capacity. The testimony is that she "had charge of the girls," of whom plaintiff was one. The arrangement was that she was to remain in his service "as long as she complied with the rules of the house," at the customary salary for that class of work, which defendant says was \$12 per week. She lived in his boarding house three weeks and two days. He charged her at the rate of \$7 per week for her board and lodging. The wife of defendant made an assault upon her in her own room, struck her with a loaded cane and threatened to kill her. She then left defendant's boarding house and his service. She testifies that she was willing to carry out her part of the contract, but was afraid to do so on account of Mrs. Hanlin's threats. The defendant was fully cognizant of the assault, being present at the time. At the time she left, her salary amounted to \$32.00, and the charges against her for board and lodging to \$23.00. The defendant undertook to apply the entire salary upon the Kansas City account, leaving the board and lodging unpaid; and to secure himself for these seized a trunk and valise belonging to plaintiff, and their contents. This is the property in controversy, and upon which he claims a lien. The trunk contained the plaintiff's stage dresses, without which she was unable to follow her calling. Employment was offered to her, but she could not accept it because she could not get her clothes.

The controversy between counsel for the parties is over the doctrine of application of payments by a creditor in the absence of direction from the debtor; defendant's counsel contending that, inasmuch as the plaintiff never indicated the application which she desired made of her wages, the defendant could apply them as he pleased, and that in crediting

them on the Kansas City debt he only exercised a right given him by law; and counsel for plaintiff maintaining the contrary position.

We are not disposed to go into this question. The defendant is hardly in a position to insist upon the application of this or any other abstruse doctrine in his case. Counsel for defendant, after reviewing the evidence, says: "From these facts no fair mind can escape the conclusion that the intention of appellee was to pay her indebtedness to appellant with work, and to continue to work for him until he was fully paid, and the intention of appellant was to receive such work as payment." We think counsel has correctly interpreted the agreement. Defendant was bound to accept payment in work, and consequently was bound to provide the work, and see that the plaintiff was permitted to do it. As his employee he owed her certain duties, among which was the use of proper means to protect her from violence at the hands of her co-employees, and others in his service. He admits in his testimony that she did her work well, and complied with all his rules and regulations. She did not desire to abandon his employment, and did not do so voluntarily. She was terrified out of his service by a person in whose charge he had placed her, and for whose acts he was responsible. He had knowledge of the facts, and took no precautions for her protection. Fears for her personal safety compelled her to leave. It was not her fault, but his, that he was not paid in accordance with the agreement. He seized and retained articles belonging to her, and necessary to her vocation, so that she was unable to obtain employment elsewhere. Under these circumstances he will not be permitted, in this action, to say that the indebtedness is not fully paid. The amount actually earned by her exceeds the charge for her board and lodging; he has the excess, and may apply it in satisfaction of the Kansas City debt. She owes him nothing for board and lodging, and he has, therefore, no lien. The judgment will be affirmed.

Affirmed.

3	522
e388	273

CITY OF PUEBLO, APPELLANT, v. JACKSON, APPELLEE.

1. APPEALS—STATUTORY CONSTRUCTION.

The statute (Mills' Ann. Stat. sec. 4444), providing that a municipal corporation may take an appeal and have a writ of error made a *superseas* without bond, has no reference to an appeal from the county to the district court.

2. SAME.

A municipal corporation cannot appeal from the county court to the district court without bond.

Appeal from the District Court of Pueblo County.

Mr. M. G. SAUNDERS, for appellant.

Messrs. McFEELY & MCALINEY and Mr. A. W. ARRINGTON, for appellee.

THOMSON, J., delivered the opinion of the court.

Appellee had judgment against appellant in the county court. The cause was heard and final judgment rendered on the 28th day of January, 1892. Appellant gave notice of appeal to the district court. Its appeal bond was filed and approved February 13, 1892,—sixteen days after judgment rendered. The transcript was filed in the district court, and the appeal dismissed, because the bond was not filed within ten days after the rendition of the judgment, no order having been made by the court extending such time.

Section 2 of an act relating to appeals from county courts to district courts, approved April 14, 1885, provides as follows:

“Sec. 2. No appeal shall be allowed, in any case, unless the following requisites be complied with: First. The appeal must be made within ten days after the judgment [is] rendered, or, when judgment is by default or nonsuit, within ten days after the refusal of the county court to set aside the default, or nonsuit, and grant a new trial; *provided, however,*

that the county court may at any time within the period above limited, upon good cause shown, extend the time for an appeal. Second. The appellant, or some person for him, together with one or more sufficient sureties, to be approved by the judge or clerk of said court, must, within the time above limited, or within such further reasonable time as shall be fixed by the court, enter into an undertaking payable to the adverse party as follows: In case the judgment be for the payment of money, and against the party appealing, the undertaking shall be in double the amount of the judgment or decree appealed from, conditioned for the prosecution of the appeal with effect and without delay, and for the payment of all costs, and whatever judgment may be awarded against the party so appealing, on the trial or dismissal of said appeal in the appellate court, and for the payment of the judgment appealed from, in case said appeal shall be dismissed; and in case the judgment or decree appealed from be in favor of the party appealing, or shall not be for the payment of money, the penalty of the undertaking shall be in such sum as the county court shall deem sufficient to cover costs, expenses and damages, and be conditioned that the party appealing shall abide, fulfill and perform whatever judgment may be rendered against him in that cause by the district court, and for the payment of all damages which the opposite party may sustain by reason of such appeal, and the delay incident thereto, and for the payment of costs." Session Laws 1885, p. 158; Mills' Ann. Stat. § 1086.

No order appears extending the time. By the terms of this section, the bond in question was filed too late. This is not disputed by appellant, but it is insisted in its behalf that it, being a municipal corporation, was not required to give bond in order to make its appeal; and that, therefore, the time within which the bond was filed, or whether a bond was given at all, is immaterial; and in support of this contention reliance is had upon section 1 of an act of the general assembly, approved March 25, 1885, which reads as follows:

"Section 1. That in all actions, suits and proceedings in

any court in this state, in which a municipal corporation of this state shall be a party, such municipal corporation may take an appeal and have a writ of error made a *supersedeas*, as now provided by law, without giving bond." Session Laws 1885, p. 369; Mills' Ann. Stat. § 4444.

It will be observed that the passage of this act was prior in point of time to the passage of the act containing section 1086, Mills' Statutes, which we have quoted. If there is a conflict between the two sections, the one which is later in time will operate as a repeal of the other, in so far as the inconsistency exists. Section 1086 is peremptory in its language, and does not allow an appeal from the county to the district court in any case whatever, unless the prescribed requisites be complied with; while section 4444 permits appeals by municipal corporations without compliance with such requisites. Whatever effect the legislature may have intended section 1086 to have upon section 4444, it, being a later enactment, would govern in this case; and the giving of the bond, within the time specified, would be essential to the perfection of the appeal.

But we do not think there is any necessary inconsistency between the two sections. The phraseology of section 1086 is not inconsistent with the assumption that the appeal there mentioned is an appeal from a county or district court to the supreme court. The section provides that a municipal corporation may take an appeal and have a writ of error made a *supersedeas*, without giving bond; and thus connects "appeal" and "writ of error" in such manner that they would both seem to have reference to the same class of cases, viz., cases which are reviewable for error. There is no writ of error from a district to a county court. Cases go from the latter to the former by appeal only. They are not reviewed in the district court, but are tried *de novo*—in precisely the same manner as if they had been originally commenced there; so that the language of section 1086 would not appear to fit a case of appeal from the county to the district court.

In construing a statute, the object is to arrive at the in-

tention of the legislature in enacting it; and if, upon its face, that intention is doubtful, then means, outside of the statute, may be employed to reach the desired result. Other legislation, affecting the same subject-matter, is one of the means by which this end may be attained; and it may so far aid us in ascertaining the legislative intent that the difficulty encountered in the statute itself is readily obviated.

The following is section 24 of an act, entitled "An act in relation to appeals to the supreme court, and concerning the jurisdiction thereof and practice therein":

"Sec. 24. The trial court or judge may, in its discretion, dispense with or limit the security required by this act when the appellant is an executor, administrator, trustee, or other person acting in another's right. When a municipal corporation is the appellant, the court or judge shall direct a stay of execution after appeal, upon the motion of the appellant, without filing a *supersedeas* undertaking." Session Laws 1885, p. 355; Civil Code, § 395.

This section provides the manner in which a municipal corporation may make the right granted to it by section 1086 effective, and perfect its appeal to the supreme court without giving bond. There is nowhere any legislation making such provision in the case of an appeal from a county court to a district court, or in the case of any appeal, except to the supreme court. All of the three sections we have quoted were enacted at the same session of the legislature. Section 1086 had been enacted but a few days when section 4444 was enacted. If the legislature had regarded this section as in any way inconsistent with section 1086, and had intended by it to repeal, amend, or modify section 1086, we would expect to find some reference to the section, indicative of such intention, in the language of section 4444. The enactment of Code, section 395, is conclusive that it did not intend its repeal; and in providing the method by which the right granted could be made available in appeals to the supreme court, and failing to make such provision in any other class

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of appeals, it clearly indicated that it regarded section 1086 as applicable only in cases of appeal to the supreme court.

Until the enactment of section 4444, municipal corporations were, in the matter of appeals, upon the same footing with private corporations and individuals. They could take no appeal to any court without giving bond. That section changed the existing law in respect of appeals to the supreme court, leaving all other appeals in the same situation and subject to the same requirements as before ; and section 1086 re-enacted the antecedent law relating to appeals from county to district courts. In this case an appeal bond, given within the time limited in the latter section, was essential to the appeal. The statutory requirement in this particular not having been complied with, the appeal was properly dismissed, and the judgment will therefore be affirmed.

Affirmed.

3	526
10	173
3	526
14	146
14	168

THE UNION PACIFIC, DENVER & GULF RAILWAY COMPANY,
APPELLANT, v. WILLIAMS, APPELLEE.

1. CONTRIBUTORY NEGLIGENCE.

The doctrine of contributory negligence cannot be invoked as a defense when the law requires no precautionary action on the part of the party damaged.

2. EVIDENCE OF VALUE.

The value of articles which have no market value may be established by evidence of their cost, use and condition at the time they were destroyed.

3. MARKET VALUE.

The value of an article for which there is no home market may be ascertained by deducting the cost of transportation from the price to be obtained in the nearest market.

Appeal from the District Court of Larimer County.

Messrs. TELLER, ORAHOD & MORGAN, for appellant.

No appearance for appellee.

THOMSON, J., delivered the opinion of the court.

Appellee recovered judgment against appellant, a railroad corporation, for the destruction of certain property by fire, alleged to have been ignited from an engine operated and managed by appellant. Appellant objects to the act of March 31, 1887, (Session Laws, 1887, page 368,) under which this action was brought, as being in violation of the provisions of the constitution of the state; but the objection is not seriously urged. The constitutionality of the act was upheld by the supreme court in *U. P. Railway Co. v. DeBusk*, 12 Col. 296; and this court followed the decision in that case in *U. P. Railway Co. v. Arthur*, 2 Col. App. 159. The only tribunal in this state having jurisdiction in the matter of the construction of constitutional provisions having passed upon the question, it is not open for argument in this court. The principal errors relied upon for a reversal of the judgment relate to the admission of testimony in behalf of appellee, and the failure of the court to instruct the jury that contributory negligence on his part would preclude his recovery. The latter question was disposed of in *U. P. Railway Co. v. Arthur*, *supra*, where the court say: "We are at a loss to see how the doctrine of contributory negligence can be invoked as a defense, where there is no law requiring precautionary action on the part of the party damaged, and no question of negligence on the part of the corporation can be made or adjudicated." Of course if a party should knowingly or purposely place his property in a situation where sparks from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction. But such an act would scarcely come within the definition of contributory negligence; it would be a fraud from which its author would not be permitted to derive an advantage. Nothing of this kind is, however, claimed here. The appellant introduced no evidence; the testimony for appellee discloses no negligence on

his part ; and as the liability of the appellant is fixed by the statute, irrespective of any negligence of its own ; and as any negligence of the owner of the property is not to be considered, unless it comes within the doctrine announced in *D. & R. G. R. Co. v. Morton*, ante, 155, where it was shown that the owner, being present, suffered his property to remain in dangerous proximity to a fire in actual progress, without any effort to remove or protect it,—there was no room for the instruction suggested, and the giving of it would have been error.

The objections to the testimony go to the competency of the witnesses to testify as to values. The property destroyed was two and three fourths tons of bleached bones, one set of double harness, one wagon, one ton of hay, one hay-rack and two horses. There was no market for the kind of bones burned, short of St. Louis or Chicago. These bones had been collected by appellee for shipment to market. He had kept himself advised of their value in Chicago. These were cutlery bones ; he knew their price for the past three years, and had quotations from the cutlery manufactory at Chicago after the fire. He also knew the cost of transportation to Chicago, and fixed their value by deducting this cost from the Chicago price. As there was no home market for the bones, we do not very well see how their value could have been fixed by any other method. The horses and wagon had been used for some time. There was no general market for secondhand articles of that description. There was no place in the vicinity where they were bought and sold. Appellee had them for his own use. The only way to sell them was to find a man who wanted them. They had a value, notwithstanding there was no market for them. It will not do to say that because such things are not bought and sold in the market, and a market value is therefore not susceptible of proof, they can be destroyed, and the owner receive nothing for them. The witnesses were men who bought and used such things in their business of farming, and based their judgment on their practical knowledge ; the original cost of

the articles, the amount of use to which they had been subjected, and their condition at the time, were taken into the consideration, and in this way the witnesses reached an estimate of their value. We are not disposed to say that because there was no market value which could be proven, therefore appellee should recover nothing ; and in the absence of such proof, for the reason that it could not be made, we think that the testimony which was given was competent and proper for the purpose for which it was offered. *State Ins. Co. v. Taylor*, 14 Col. 499 ; *Mouat Lumber Co. v. Wilmore*, 15 Col. 136.

The hay-rack was new. The appellee bought the material and made it himself, and to suit himself. It is not probable that he could have sold it for a fraction of what it cost. There was no person engaged in the business of dealing in such things, and so he very properly added the cost of the material to the value of his labor in making it, and gave the sum total as the value of the hay-rack. He raised the alfalfa on his farm ; it was one of his crops, and he is presumed to know its value. Appellee testified that he knew the value of horses at the time these were burned. He was not a horse trader, although he had traded in horses in a limited way ; he was fond of horses, and these were for use on his farm. He had seen horses bought and sold, both at private sale and auction. We think that as the owner of the horses, he laid a sufficient foundation to enable him to testify as to their value. Other witnesses who stated that they were acquainted with the value of horses at the time corroborated him. The appellant was probably not dissatisfied with his valuation of any of the property, because it offered no evidence, and made no effort to reduce such valuation.

On a review of the entire case, we are unable to discover any reason why the judgment should be reversed, and it is therefore affirmed.

Affirmed.

UNION PACIFIC, DENVER & GULF RAILWAY COMPANY,
APPELLANT, v. McCARTY, APPELLEE.

1. PRACTICE.

When the testimony is conflicting, the finding of questions of fact by the court will not be disturbed on review, but will be taken as found.

2. RECEIPTS.

A receipt, even when it purports to be in full, is at all times liable to explanation and impeachment.

Appeal from the County Court of Pueblo County.

Messrs. TELLER, ORAHOD & MORGAN and Messrs. BETTS & VATES, for appellant.

Messrs. COAN & GRIGGS and Mr. S. G. SPENCER, for appellee.

REED, J., delivered the opinion of the court.

Appellee brought this action originally before a justice of the peace, claiming the sum of \$186.40 balance due for stone alleged to have been delivered to appellant. An appeal was taken to the county court, case tried by the court without a jury, resulting in a judgment for \$171.81.

It appears that one J. H. Naughton had a contract for bridge and stone work on the line of appellant's road. He ordered the stone from plaintiff at the agreed price of \$4.50 per cubic yard, the railway company to furnish transportation. It was estimated that fourteen car loads would be required. After seven car loads had been shipped to Naughton at Denver, he notified appellee by wire to ship no more stone until further orders. It appears that four car loads of ten cubic yards each were used by Naughton; the remaining three cars were not used, and it is alleged by appellant that the stone was not received by the company. By the evidence no

reason is given for not receiving and paying for the other three cars. About a year later, October 10, 1889, the company paid appellee \$180, being the price of the four cars used, and appellee executed the following receipt:

“\$180.00 PUEBLO, Colo., Oct. 10th, 1889.
 “Received of The Denver, Texas & Fort Worth Railroad Co., one hundred and eighty, no-100 dollars, in full settlement of account as follows:
 Dated Oct. 2, 1888, 40 cubic yards stone at \$4.50 per yard.
 Audited bills No. 1553. No. _____ No. _____
 Local Treas., check No. 5605, _____
 No. _____
 (Sign here.) C. F. McCARTY.
 I. P. 295.”

The judgment being for the remaining three cars of stone and interest on the same, numerous errors are assigned of record, the contention of appellant being:

First. That they were not responsible from the fact that Naughton was to furnish the stone himself and all material, and do the work.

Second. That he was not the agent of the company in the transaction with the appellee.

Third. That the court erred in finding that the receipt of October 10th was not a receipt in full of all demands by McCarty as against the company.

The other errors assigned are not deemed of sufficient importance to warrant examination at any length; are far more technical than substantial.

Testimony in the case is very conflicting. There is no question in regard to the seven cars having been shipped over the Atchison, Topeka & Santa Fe road from the quarry to the appellant corporation, or of the receipt of the cars by it and its payment to the Atchison Company of the freight.

B. W. Grover, who was division superintendent of that di-

vision of the appellant's line on which the stone was used, testifies that Naughton, the contractor, was to furnish all material, and the railroad company to transport it free of charge, and that the contractor was to receive a certain price, which he has forgotten, for the complete work in wall.

It is evident that Mr. Grover was laboring under a misapprehension in regard to the bill, as his testimony is contradicted by his own acts and the records of the office. The following was in evidence :

“ PUEBLO, Oct. 2, 1888.

“ Denver, Texas & Ft. Worth Railway Co.,

“ Dr. to C. F. McCarty,

“ For 40 cubic yards stone at \$4.50 per yard. Amt. \$180.

“ C. F. McCARTY,

“ Contractor.”

“ PUEBLO, 10-4, '88.

“ Mr. G. A. ARMSTRONG, Supt. B. and B.,

“ Denver, Colo.

“ Dear Sir :—The above bill is for the stone used in construction of the masonry of abutments on Cherry Creek and turn-table. The company was to furnish this stone and transportation for same. Have voucher made favor of party named above and send to Pueblo.

“ Respt. etc.,

“ J. H. NAUGHTON.”

“ This is O. K.

“ G. A. ARMSTRONG,

“ Supt. B. and B.”

“ Authorized, examined and found correct. Examined and approved.

“ B. W. GROVER, Supt.”

There was no contract made in writing. Naughton testifies to the contract made with Grover whereby the appellant corporation was to furnish the stone, he to furnish lime, cement and other material, and do the work. He also testifies that under the instructions of Grover to order the stone from appellee he agreed upon the price and ordered it.

It is claimed in the argument that Naughton, being only a contractor, was not the agent of the company to make the purchase and could not bind the company by any such contract. If the testimony of Naughton is to be believed, which it evidently was by the court, it certainly was a special agency for that specific purpose. By the orders and instructions of Grover to purchase the stone for and on behalf of the appellant corporation, the agency need not have been general, and Grover, who is authority on the question, had full power to delegate the purchase of the stone to Naughton and designate the party from whom it should be purchased, and in so far as this specific agency was created for the single act the company would be held for the performance. The conflict of testimony was so marked that it was impossible to harmonize it, and all the court could do was to give credit to one party and disbelieve the other. Under such circumstances, the finding of questions of fact by the court will not be disturbed on review in this court, but will be taken as found. This rule has been announced so frequently that it is hardly worth while for counsel to insist upon a reversal by reason of a superior weight of testimony. The position taken that the receipt was a receipt in full of all demands and operated as a full release to the corporation for all claims of the appellee is untenable. If it had been, as supposed by counsel, a receipt in full, the well established rule of law is, and has been so often asserted that authorities in its support are unnecessary, that a receipt even purporting to be a receipt in full is at all times liable to explanation and to impeachment. An examination of the receipt given shows that it was not a receipt and release of all demands, but, as stated in the body of the receipt, "In full settlement of account as follows: 40 cubic yards of stone at \$4.50 per yard." That seven car loads were shipped, amounting to 70 cubic yards, is not disputed, and the receipt upon its face, by the bill attached, shows conclusively that it was not in payment or settlement of *seven* car loads of stone, but of *four* loads. Under any circumstances the receipt could not, even if un-

explained by all the testimony, be regarded as a receipt in full for seven car loads of stone of ten cubic yards each.

We conclude that the court was warranted in finding that the stone was to be furnished by the appellant corporation; that Naughton was authorized by the division superintendent to purchase the stone from the appellee, and that he did so at an agreed price of \$4.50 a cubic yard; that seven car loads of stone were shipped under the contract, four of which were paid for, and the price of the remaining three unpaid; that the receipt offered in evidence was not a release of all claims, and that the balance as found by the court was due; and that the judgment should be affirmed.

Affirmed.

MANGER, APPELLANT, v. GRODNICK, APPELLEE.

EMPLOYER AND EMPLOYEE.

An employee who is discharged without cause before the expiration of the term of employment is entitled to damages for the breach of the contract.

Appeal from the County Court of Arapahoe County.

Mr. WILLIAM YOUNG, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

Appellee, plaintiff below, brought suit before a justice of the peace; what the judgment was is not shown by the record. An appeal was taken to the county court, where a trial was had by the court, resulting in a judgment for the plaintiff for \$50.00, from which this appeal is prosecuted.

Appellant and one Gustave Fleckles formed a partnership to open and operate in Denver a place of public amusement,

a part of the scheme being to furnish musical entertainments. To obtain the necessary talent, negotiations were entered upon with appellee somewhere in the east, resulting in his agreeing to get together and employing, in the language of one of the firm in giving evidence, "Eight good ladies," and bringing them to Denver at the expense of the firm. Necessary money for the expenses and transportation was furnished by the firm, appellee was to be manager in charge, employ them himself, furnish the entire troupe, including his wife and himself, at \$160 or \$165 per week. After arrival of the troupe a contract was made whereby appellee was to be employed six months at \$15.00 per week, his wife was to receive \$25.00 per week, and the other females prices graduated from \$20.00 down, but it appears that the employment of the females was to be by the week. About this time the firm was dissolved, Fleckles going out, leaving appellant sole proprietor. At the end of the first week's exhibitions the company was paid in full by appellant. On the Monday following, for some unexplained reason, appellant concluded to discontinue that branch of the business, and he discharged the female troupe and notified appellee that his services would no longer be required; no dissatisfaction at his services was expressed nor valid reason for his discharge. The suit was brought for damages for failure to perform the contract.

The testimony of the parties was somewhat contradictory, but there was no serious discrepancy in regard to the main facts. Several supposed errors are assigned which we have examined; none sufficiently serious to warrant interference by this court occurred.

It is clear from all the evidence that appellee was employed for six months at \$15.00 per week, and his wife was to have been employed from week to week for some indefinite period at \$25.00 per week. At the end of the first week the business was discontinued without fault of appellee, and he found both himself and wife among strangers and out of employment. The amount found as damages (\$50.00) for the breach of the contract of employment for six months does not seem

excessive, and of his right to recover damages for the breach, where no legal or valid reason for his discharge was given, there can be no question.

The judgment will be affirmed.

Affirmed.

MEYER ET AL., PLAINTIFFS IN ERROR, v. HELLAND,
DEFENDANT IN ERROR.

1. PRACTICE IN JUSTICE'S COURT—JURISDICTION.

The amount indorsed upon the summons issued by the justice of the peace as the amount of the plaintiff's claim concludes the plaintiff as to the amount of his recovery, unless in some legal and recognized manner it be changed.

2. SAME.

It is erroneous to enter judgment in a case on appeal from a justice of the peace in excess of the amount indorsed upon the back of the summons.

Error to the County Court of Phillips County.

Messrs. SMITH & MUNTZING and Mr. WILLIAM E. BECK,
for plaintiffs in error.

No appearance for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

This action was begun before a justice of the peace in one of the precincts of Phillips county. Observing the mandate of section 1933 of the General Statutes of 1883, the justice indorsed on the back of the summons the amount of the claim as one hundred dollars. The plaintiff contended that he had sustained damages by the taking of certain horses from his pasture by the defendants, Meyer and Reeves. Apparently the plaintiff's title was a qualified one, resulting from his possession and the contract under which the stock came to

him. The trial before the justice resulted in a judgment in favor of Helland for \$12.50 and the costs, which were taxed at \$8.05. An appeal was taken to the county court. The usual steps prescribed by the statute were followed, and the record got into the county court, where a new trial was had and judgment there rendered for Helland in the sum of one hundred and fifty dollars. While the case was pending in the county court and before its trial, Meyer and Reeves moved to dismiss it on various grounds. It was claimed that the judgment was entered on August 30th and the appeal bond was not filed till September 12th, more than ten days after the entry. This was the principal ground of the motion. On the final hearing of the motion, the county court found that the appeal had been taken according to the statute, and thereafter proceeded to try the case, and entered the judgment of which the plaintiffs in error complain.

That court was powerless to enter a judgment beyond the amount named in the plaintiff's summons. The amount indorsed on the back of the summons as the amount of the plaintiff's claim, like the *ad damnum* in the ordinary complaint, concludes the plaintiff as to the amount of his recovery, unless in some legal and recognized manner it be changed. *Denver Brick Manfg. Co. v. McAllister*, 6 Colo. 326; *Eaton v. Graham*, 11 Ill. 619; *T. P. & W. Ry. Co. v. Pence*, 71 Ill. 174.

For this error the judgment must be reversed and remanded for a new trial.

Reversed.

MYERS, APPELLANT, v. BOWEN, APPELLEE.

1. IMPLIED WARRANTY—CAUSE OF ACTION.

In the sale of a chattel there is an implied warranty of the legal ownership of the vendor. A breach of such warranty constitutes a cause of action, but not until the vendee shall have been deprived of the chattel or shall have reimbursed his own vendee.

2. SAME.

No intermediate covenantee can sue his covenantor until he himself shall have been compelled to pay damages upon his own warranty.

Appeal from the County Court of Arapahoe County.

Messrs. BARTELS & BLOOD, for appellant.

Mr. S. S. ABBOTT, for appellee.

REED, J., delivered the opinion of the court.

In 1887 appellee bought of appellant a horse for \$100. In 1889 he sold it to a man by the name of Parker. Parker sold to Burke. In September, 1890, one N. R. Pratt saw the horse and identified it as one that had been stolen from him, took and retained the possession. It appears that both appellant and appellee were satisfied with Pratt's claim of ownership and allowed him to retain the animal without controversy.

The action was brought by appellee to recover the price paid. On trial before a justice of the peace the plaintiff obtained judgment for \$80 and costs. An appeal was taken to the county court, a trial had, resulting in a judgment for the plaintiff (appellee) for \$100 and costs, from which this appeal was prosecuted.

Several general assignments of error are made which may be consolidated into one, and when so consolidated is in effect that the court erred in the law of the case and that the judgment should have been for the defendant. Counsel in argument contend that the horse having been taken from the possession of Burke, a vendee, and appellee having retained the money received for the horse, and having neither voluntarily paid back nor been made liable to pay back the money received for the horse by process of law, had suffered no damage and could not maintain his action. According to all the authorities there is in the sale of the chattel an implied warranty of the legal ownership of the vendor, which amounts to

a covenant that the vendee shall not be evicted from or disturbed in the possession of the chattel. A breach of such implied warranty gives a cause of action, but to maintain the action the vendee must be evicted from the possession of the chattel, or have reimbursed his own vendee, in other words he must have sustained damage by reason of the eviction.

In this case appellee was not injured by Pratt taking possession of the horse; Burke, the third vendee, was dispossessed. Appellee had sold the horse and received and retained the money; had not reimbursed any subsequent vendee nor been made liable to do so. It does not appear that any claim had been or was being asserted by reason of the failure of title, and we are not to presume any claim would be asserted or any damage sustained by the appellee. If the present action is sustained he will have received pay for the animal twice, once from his vendee and again from the vendor. Of appellant's liability to his vendee there can be no doubt, but until he is in some way made liable or voluntarily refunds the money received he can maintain no action, having sustained no injury. The decisions of the courts, as to when and to whom the vendor is liable, are not perfectly harmonious, but the prevailing doctrine appears to be the rule as asserted in *Burt v. Dewey*, 40 N. Y. 283, where it is said, "No intermediate covenantee can sue his covenantor till he himself has been compelled to pay damages upon his own warranty." Both in equity and law this would seem to be the only just and practicable rule.

The judgment will be reversed and cause remanded.

Reversed.

PULLMAN PALACE CAR COMPANY, PLAINTIFF IN ERROR,
v. FREUDENSTEIN, DEFENDANT IN ERROR.

NEGLIGENCE.

Negligence is the basis of a sleeping car company's liability to a passenger for the loss of wearing apparel. When its negligence is not shown, a judgment against it for such damages cannot be sustained. But when a loss is shown without negligence on the part of the passenger, the burden is then cast upon the company to show due care upon its part.

Error to the County Court of Arapahoe County.

Messrs. ROGERS, CUTHBERT & ELLIS, for plaintiff in error.

Mr. W. P. HILLHOUSE and Mr. RALPH LANDON, for defendant in error.

BISSELL, P. J., delivered the opinion of the court.

In April, 1890, Freudenstein took passage on the Rio Grande Road for Sargent, Colorado. He was the holder of a first class railway ticket, and bought Pullman transportation on what is called a tourist sleeper between Denver and Sargent. The car was "No. 462," and in charge of a porter named Allen. The tourist sleepers differ slightly from the first class Pullman, in that they have no drawing rooms and no lavatories which interfere with the general structure of the car. As in the case of all sleepers, the berths opened on a center aisle, were provided to a certain extent with head and foot boards which separated the occupants, and the sleepers were protected by curtains from the general view. There was nothing to obstruct the observation of the porter in charge, and he could see the entire car from door to door, and observe the movements and conduct of the passengers. Some evidence was offered concerning the movements of Freudenstein from the time he got on the car until the loss; but it is

sufficient to state that he went to bed after his berth was made up and hung his overcoat inside of the curtains which protected his berth, and went to sleep. Later in the night, he discovered that it was gone, got up and complained to the porter and together they made a search to find it, and observed the passengers alighting at Salida (which was a way station) to see if some person had taken it by mistake. The coat was not found, and the porter was unable to explain its disappearance. Some passengers got off at intermediate stations, but what they took with them does not transpire. Freudenstein, at the trial of the case, proved the loss of the overcoat and rested. The company moved for a nonsuit, but the motion was denied. They then put the porter on the stand, and he gave evidence that he was on duty and engaged in continuous watch of the car from the time it left Denver through the night until after the loss. On this proof, judgment was entered for the value of the coat and its contents, and the case was brought here on error.

The liability of the company, if any, under these facts must of necessity spring from the terms of some express contract between the company and the passenger, or a contract to be implied from the circumstances of the accidental relation of passenger and carrier. This relation must measurably determine the obligations of the Pullman company, and fix the extent to which the proof must go if they are to respond to losses of this description. It is familiar learning that nothing would excuse the innkeeper or the common carrier when called on for a guest's goods, or what may have been delivered for transportation, except proof that the loss was occasioned by the acts of God or the king's enemies. They were both adjudged to be practically insurers of the property. Storms and armed enemies in open rebellion alone operated to excuse default in performance. The law to this day has practically remained unchanged. With the exceptions and reservations contained in modern bills of lading, and admitted by the courts to be binding as contracts under some circumstances, or with the force and effect of notices,

agreements or statutes by which keepers of inns seek to limit what they are pleased to term the rigors of the common law, we have nothing to do. Without these, such servants of the public are held to a legitimate, advantageous and entirely proper accountability. An accountability fully warranted by their status and their profits. But the groundwork of the liability was found in the facts which gave rise to the relation and in the correlative advantages of the innkeeper and the carrier in the collection of their charges. The keeper of the inn was bound to receive the guests, and had a lien on his guests' goods for the price of the entertainment. He furnished them food and lodging, and had the right to exclude from his house all but guests and servants of his own choosing. The carrier had the possession, sole custody and control of goods delivered to him for carriage, could enforce his lien for freight and retain possession until it was paid, and only his employees could interfere with it during the journey. The courts in a long series of adjudications have held that the Pullman company cannot be made liable for lost baggage on these grounds. They have held the rules governing innkeepers to be inapplicable, because of the difference in the existing conditions. The law of the carrier has been adjudged to be equally unsuitable because the possession was not exclusive. The latter difficulty does not seem to me to be entirely insurmountable. The possession of the Pullman company is practically as exclusive as that either of the innkeeper or the carrier. In either case, the risk of dishonest guests is always an element of danger which cannot be eliminated. No person has access to the cars except the Pullman servants and the railroad employees. It is no substantial enlargement of the risk to hold the Pullman company as guarantors for the honesty of these employees. No difficulty could be experienced in reducing this element of risk to an insignificant minimum. Eliminating these features, the company does practically have possession of the travelers' goods. There may not be the formal delivery, but the exclusive possession which ordinarily exempts the railroad company from

liability for lost baggage is not retained by the traveler. Of course, it is conceded that if the passenger by coach leaves his coat in the seat, and it be lost, the railroad company cannot be compelled to pay for it. They never had any possession on which a liability could be predicated. No such condition exists in a Pullman car. There the company has possession. A possession not at all similar to that which is called constructive. The passenger buys a place to sleep in, and when he hangs up his coat at the invitation of the Pullman company, he ought both truthfully and legally to be held to give his garment into the possession of the company. If lost, they should be held liable. The only question is whether the loss alone is sufficient to fix the responsibility. The authorities hold otherwise. By an almost unbroken current, which has such volume and impetus that we do not feel vigorous or powerful enough to stem or turn it, courts have held that the basis of the liability is the proven negligence of the company. Wood's Railway Law, vol. 3, § 368 *et seq.*; Thompson's Carriers of Passengers, p. 531; *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243; *Hillis v. The C. R. I. & P. R'way Co.*, 72 Iowa, 228; *Scaling v. Pullman Palace Car Co.*, 24 Mo. Appeal, 29; *Carpenter v. New York, N. H. & H. R. R. Co.*, 124 N. Y. 53; *Pullman Palace Car Co. v. Pollock*, 69 Texas, 120; *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; *Pullman Palace Car Co. v. Gardner*, 16 A. & E. R. R. Cases, 324; *Stearn v. Pullman Car Co.*, 8 Ontario, 171 (21 A. & E. R. R. Cases, 443); *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302.

While we concede that the law has been thus settled, and that negligence must be shown before the plaintiff can recover, we do not agree with counsel as to what will discharge that duty. It is insisted that there must be positive evidence of a want of care, as by proof of the absence of a proper and sufficient number of servants, a lack of the watch, which the cases decide the company must maintain, or some equivalent testimony showing the positive omission of what the law has

imposed as a part of the duty which the company owes the traveler to whom it has sold accommodations. This does not coincide with our views of the relative duties of the passenger and the carrier. The Pullman company had assumed a specific obligation by the sale of a ticket which entitled the traveler to a place to sleep. It was sold with the intention that it might be used for that purpose; when the berth is thus applied to the purposes for which it was sold, the company impliedly agrees that it will use due care to protect the property of the traveler. The passenger is sold a place to sleep which the vendor knows is to be used for that purpose. His personal belongings are taken to his apartment with the knowledge and assent of the seller. Thus this property is in the place provided by the company, put there with their consent and approbation, and practically surrendered to their control and care. When loss is shown, it does appear that the company was guilty of negligence sufficient to entitle the loser to recover. The breach occurs the instant the property is lost. To prove the loss is at least to make *prima facie* proof of the negligence of the company. It is enough to put the company to proof of due care and the maintenance of a proper supervision of the car and its occupants. The burden is then cast on them to prove watch or whatever else may be necessary to establish due care and want of negligence on their part. To shift the burden of this on to the traveler puts him to such a positive disadvantage that nothing short of an imperative necessity would lead us to accept this conclusion. The present case was brought within this rule. The plaintiff proved loss and rested, nonsuit was denied and the defendant produced evidence which if credited entitled them to judgment. This proof has been fully stated. The porter in charge of the car was put on the stand and testified to an absolutely continuous watch during the entire night. This must be taken as true, for there was nothing to contravene it. We have no alternative but to accept it as veracious. It establishes due care on the part of the company. The known and well understood conditions of modern travel show the

impossibility of exact knowledge of the property of the departing passenger who may leave at an intermediate station. If the company is permitted to escape the absolute liability of the innkeeper, such care and diligence as is consistent with proven and well understood conditions can only be exacted. In the present case, the company discharged this duty. The negligence which alone justifies a recovery against them is not established by the evidence, and the judgment against them cannot therefore be sustained.

What a subsequent trial may disclose cannot be foreseen. The judgment will therefore be reversed and the case sent back for a new trial.

Reversed.

THE COLORADO LAND AND WATER COMPANY, APPELLANT,
v. THE ROCKY FORD CANAL, RESERVOIR, LAND, LOAN
AND TRUST COMPANY, APPELLEE.

3 545
5 191

1. CANAL COMPANIES—SUCCESSION.

A canal company may, while prosecuting its work of construction with proper diligence, sell and dispose of such rights as it may have, and the grantee may become a legal successor, but in order to become such it must succeed to the charter rights of the grantor, prosecute the enterprise under the same franchise and in accordance with the statement and certificate of its incorporation.

2. WATER RIGHTS—APPROPRIATION.

To constitute a legal appropriation the water must be applied within a reasonable time to some beneficial use; that is, the diversion ripens into a valid appropriation only when the water is utilized by the consumer.

3. ABANDONMENT.

Upon abandonment of the construction of a proposed canal without intention of resuming, all incipient rights lapse and revert to the public, and are not thereafter capable of being sold or transferred.

4. APPROPRIATION—RELATION.

Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence the right relates to the time when the first step

was taken to secure it. What is reasonable diligence is a question of fact depending upon the circumstances of each particular case.

Appeal from the District Court of Pueblo County.

Messrs. GERRY & RITTENHOUSE and Mr. CHARLES HARTZELL, for appellants.

Mr. CHARLES E. GAST, Mr. H. A. DUBBS and Mr. JOHN H. VOORHEES, for appellee.

REED, J., delivered the opinion of the court.

This is an appeal from the decision of the district court establishing priorities to water of different irrigating canals taking water from the Arkansas river.

The controversy arose between the canals, respectively, of the parties to this suit on appeal. It appears that the proceeding was under the statute, embracing a large number of ditches. The testimony was taken before a referee, which, with his finding of facts, was filed in court.

It was found by the referee that the date of appropriation of water by appellant was April 10, 1889; that appellee made its appropriation of water January 6, 1890; that appellant's number as to priority was 50; that of appellee 52. To which report exceptions were taken by appellee. On hearing, the finding of the referee was reversed. The date of appellee's appropriation was fixed as by the referee, while that of appellant was fixed as of June 9, 1890, and Rocky Ford canal was given priority number 60, and appellant's canal number 52.

It is claimed that the decree is erroneous.

The initial points or headgates of the respective canals at the Arkansas river are practically the same, or within short distances of each other, both being near the junction of Boone creek with the Arkansas river, in Pueblo county, the canal of appellant taken out on the north side of the river, running in a general northeasterly direction, length about 70 miles—the canal of the appellee taken out on the south side of the

river, running in a general southeasterly course—length about 80 miles.

As to the dates at which appellee's company was organized, made its appropriation of water, commenced actual construction, and the time of the completion of its canal, there is no controversy whatever, the facts appear to be conceded. The questions presented are those in regard to the appellant.

As established by the evidence the facts appear to be :

Some time in the year 1889 certain parties became incorporated as The Colorado Land & Canal Company, and on the second day of July of that year filed the statement required by law and plat, by which it declared its intention to construct a canal for irrigating purposes, taking water from the Arkansas river at or near the junction of Boone creek with the river.

By the plat filed, of which it is said in the certificate: "Hereby declares that the said plat accurately shows the proposed line of the said canal and the subdivisions of land through which it passes," it is shown that from the initial point of the canal as located, to Jones' point, a distance of 23 or 24 miles, the land was barren and non-irrigable; from that point on its course, northeasterly, was good, arable land to be covered by the canal.

Prior to the 28th day of December, 1889, The Colorado Land & Canal Company had expended, as shown by the evidence, the gross sum of about \$3,471, of which sum about \$2,650 had been spent in field work, preliminary surveys, platting, office work and incidental expenses, and after location and platting, the sum of about \$780 was spent in grading or construction on the line. On the 28th day of December, 1889, The Colorado Land & Canal Company entered into an executory contract or memorandum in writing with one T. C. Henry, by which it agreed for the sum of \$10,000 to be by him paid, on certain contingencies at some indefinite subsequent time, to convey or transfer to him all of its capital stock, and contained a stipulation that no title should pass until the payment of the \$10,000, and delivered to the said

T. C. Henry the plat, field notes and data of its proposed canal, and allowed the said Henry to take possession of its proposed line of canal as surveyed and staked. Thereupon, The Colorado Land & Canal Company withdrew from its possession, stopped all operations in the way of construction, and abandoned and surrendered the same to Henry.

On April 21, 1890, a deed was made by the Canal Company to Mr. Henry in accordance with the contract, the deed was not delivered, the papers were placed in escrow and were to be void and inoperative if Henry failed to comply with his contract. He made failure, and at some subsequent time the deed was delivered to the grantor and canceled.

The Colorado Land & Water Company (appellant) entered upon the line of canal as platted by the Canal Company, but, as shown by the evidence, not for the purpose of construction upon the line as designated and platted, and only using the surveyed line as the basis or as data from which it could locate another line more satisfactory to itself. Taking Jones' Point as the initial or base, a point to the north of the original line some ten chains distant was taken—such point being about six feet higher than the original line. From such point the survey was made westerly at a greater elevation, to connect such point with a point for the reception of water at the Arkansas river. This new alignment and greater elevation carried the head of the ditch some three quarters of a mile above the junction of Boone creek with the Arkansas river—the proposed initial point as established by the Canal Company. A survey of the proposed canal to be constructed by The Colorado Land & Water Company was also made from Jones' Point northerly and easterly. While from Jones' Point to the river the two lines as established were of necessity nearly parallel and but short distances apart, after entering upon the irrigable land from Jones' Point the two lines were in no manner identical or parallel, the line of The Colorado Land & Water Company (upon which the canal was subsequently constructed) diverging rapidly to the north from the location of the Canal

Company, and in its course and alignment northeasterly continuing to diverge to the north, until at points near the terminus of the survey and plat of the Canal Company it was several miles north of that line. The line as surveyed by the Canal Company ended near the center, east and west, of Otero county; the line of canal of the Water Company, as constructed, was continued far to the north and east through the northern part of Kiowa county to near the eastern line of such county.

It is established by the evidence and conceded, that after the filing of its plat by The Colorado Land & Water Company, the work of construction upon its line was entered upon and vigorously prosecuted. The canal is $70\frac{1}{2}$ miles in length, 55 of which was completed in October and November 1890, and the balance— $15\frac{1}{2}$ miles in July, 1891. Water was first turned in on the 29th day of August, 1890.

The appellant became incorporated January 18, 1890. It will be observed that the contract between the Canal Company and Mr. Henry was made before the incorporation of the Water Company—it bears date December 28, 1889. On the 24th of October 1891, some fifteen months after the completion of the greater portion of its canal and the appropriation of water under its charter, the Water Company by a new contract of purchase, secured from the Canal Company a deed of the supposed rights of the Canal Company.

The principal contention is, that by reason of Mr Henry's transactions with the Canal Company and its subsequent purchase it succeeded to its rights, and as such successor its priority to the water should be carried back to the inception of the supposed rights of the Canal Company, and thus antedate the appropriation made by the appellee; consequently, that the court erred in finding the date of its incorporation and the filing of the necessary certificates as the inception of its acquired rights.

The two important questions for determination are:

First.—What, if any, rights had the Canal Company acquired by its incipient steps?

Second.—Did the Water Company succeed to such rights?

Mr. Henry may have contemplated the formation of a company to construct a canal as afterwards constructed by the company that was formed, and, finding the ground occupied by the Canal Company, entered upon the negotiation to remove the obstruction, resulting in the memorandum of agreement executed December 28, 1889, but at that time and for several months after, until June of the ensuing year, appellant's corporation had no existence. The agreement with Mr. Henry was followed by the deed to him, as grantee of the Canal Company, executed April 21, 1890, but such deed was not delivered and was subject to defeasance on the failure of Mr. Henry to pay at a specified time. Such failure occurred, the deed was canceled, the date of the cancellation occurring in December, 1890, or January, 1891. No assignment or transfer of any kind was made by Mr. Henry to the company after its organization. By the failure of Mr. Henry to perform, the contract lapsed, and the Canal Company was fully reinstated in all its former rights so far as Mr. Henry and his company were concerned. The intention of Mr. Henry to create a company and give to it ultimately any benefits that he individually had secured from the Canal Company could not, even if the conveyance had become operative, invest the Water Company with any property or rights acquired by Henry—they could only pass by conveyance. There was no privity between the Canal Company and the Water Company; Henry having failed to complete his purchase, nothing passed from the Canal Company to either Henry or his company. These propositions need no authorities for their support. The right to priority through the Canal Company, therefore, cannot be based upon any contract or conveyance through Mr. Henry, but must, if it have any basis, rest upon the delivery to Mr. Henry of the map of its survey, the delivery of the possession of the line and the abandonment of the work of construction. The delivery of the plat invested the Water Company with no property; the abandoning of the enterprise and work of construc-

tion by the Canal Company could not inure to the benefit of the Water Company, for if it resulted in the forfeiture of its initial rights it would revert to the state, not to another corporation. It would again become the property of the state, subject to appropriation by the first comer complying with the law.

It may be conceded that at any time, while prosecuting its work of construction with proper diligence, a corporation of this kind may sell and dispose of such rights as it may have, and a grantee succeed to them and take the benefit of any right secured by the grantor from the state or others, and thus become a legal successor; but, in order to be such, the grantee must succeed in the same right, and the prosecution must be substantially of the same enterprise. In other words, it must succeed to the charter rights of the grantor and prosecute the enterprise under the same franchise, and in accordance with the statement and certificate of its organization. No corporation acquiring independently from the state a franchise to construct a canal, and completing such enterprise in accordance with its own stipulations and declarations, can claim as successor of another corporation acting under a different franchise. The right of both is derived from the state—the same source; and the fact that two canals of different corporations are nearly parallel in their alignment, and their contemplated purpose the same, does not alter their relation. The water taken and applied by appellant was the water designated in its certificate. There was no pretense that it was the water of the Canal Company, for long after its appropriation and application of water by the Water Company the ownership of the right to water in the Canal Company was recognized and negotiations were being carried on to acquire it, culminating in the conveyance as above stated; consequently we conclude that the Water Company took nothing from the Canal Company prior to the deed of October 24, 1891. See *Sieber v. Frink*, 7 Colo. 152.

At the date of the conveyance, had the Canal Company

any property or vested rights that the Water Company could acquire by a conveyance?

Prior to July 8, 1889, surveys were made, a line adopted and platted, and on that date the certificate and plat were filed as required by law. By December 24th of the same year \$780 only had been expended in excavation and construction on its line, which was never utilized by the Water Company. On that date the executory agreement was made with Henry, and all work of construction was abandoned; and as appears by the evidence and acts of the company all intention to construct was abandoned. Probably relying upon the Henry contract of sale, no action was taken or work prosecuted. After the failure of Henry to perform his contract and the cancellation of the deed, the company was still holding its supposed rights for sale in the market, negotiations were still being carried on for a sale to appellant, and as late as June 23, 1891, negotiations were being carried on between the Canal Company and appellee to sell to it. Finally, on October 24, 1891, the conveyance was made to appellant.

In the first six months of its corporate existence only a trifling sum was spent in construction; in the two years following nothing whatever was done toward construction.

In *Sieber v. Frink*, *supra*, it is said, "One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water from the date of the diversion thereof, one must within a reasonable time employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case." See also, *Canal Co. v. Southworth*, 13 Colo. 115.

In *Platte W. Co. v. N. Col. Irr. Co.*, 12 Colo. 531, it was said, "To constitute a legal appropriation the water must be applied within a reasonable time to some beneficial use, that is, the diversion ripens into a valid appropriation only when the water is utilized by the consumer." See *Canal Co. v. Southworth*, *supra*.

In *Ophir M. Co. v. Carpenter*, 4 Nev. 544, the court said, "Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence the right relates to the time when the first step was taken to secure it." Followed by *Kelly v. Natonia W. Co.*, 6 Cal. 105. In this state see *Sieber v. Frink*, *supra*; *Larimer Co. Res. Co. v. People*, 8 Colo. 617; *Wheeler v. N. Irr. Co.*, 10 Colo. 588. In subsequent decisions in this state the principles of law as stated in these cases have been followed and deemed controlling. It will readily be seen, to acquire property in water that can be the subject of conveyance, not only must there be the intention to take, manifested by the filing of the certificate, plat, etc., but such intention must be followed by actual diversion and application to the purpose intended within a reasonable time. Here there was no diversion, no application. It is unnecessary to determine in this case what a reasonable time for the construction of the contemplated canal would have been, as construction was absolutely abandoned without any evinced or declared intention of resuming. Hence the incipient right to take lapsed, and had reverted to the state long prior to the attempted conveyance, and the court was justified in finding that the Water Company took nothing by such conveyance, and that its appropriation and rights could not antedate its own organization.

It is shown that the work of construction of the Rocky Ford canal was commenced on January 6, 1890; on March 22d the necessary certificates of the corporation were filed; work was continuously and vigorously prosecuted, water turned in in July, and canal completed in October. The company, by its completion of the canal and the application of the water, perfected its appropriation, which related back to its inception, and it had a legal right to assert its priority against any and all subsequent appropriators. It is immaterial for the purposes of this case whether the inception of its rights dated from the 6th of January, when work commenced, or March 22d, when its legal right to appropriate water by filing

certificates was established, and the question will not be determined.

The evidence conclusively shows that the rights of the appellee antedate those of appellant, and there was no error in the decree of the district court, and it must be affirmed.

Affirmed.

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MCKENZIE ET AL., PLAINTIFFS IN ERROR, v. THE DENVER TIMES PUBLISHING COMPANY, DEFENDANT IN ERROR.

1. LIBEL.

The publication of words concerning merchants and traders which impute to them insolvency, financial difficulties or embarrassment, dishonesty or fraud, are actionable in themselves, without the necessity of alleging or proving special damages.

2. SAME.

The publication of the words "Business Changes—McKenzie Lumber Company, Denver, Attached," is libelous *per se*.

3. PLEADING—INNUENDO.

When the words published explain themselves, an innuendo is unnecessary.

Error to the District Court of Arapahoe County.

Messrs. REDDIN & O'HANLON, for plaintiffs in error.

Messrs. BENEDICT & PHELPS, for defendant in error.

THOMSON, J., delivered the opinion of the court.

This is an action for libel, brought by McKenzie and Leopold against The Denver Times Publishing Company. The complaint charges that the plaintiffs were copartners, doing business in Denver, Colorado, under the firm name of The McKenzie Lumber Company, as lumber merchants and tradesmen, engaged in buying and selling lumber at wholesale and retail, in the state of Colorado, and other states and

territories: that the defendant was a corporation, organized under the laws of the state of Colorado, and, as such, was the publisher and proprietor of *The Denver Times*, a daily newspaper published in Denver, and of general and large circulation in Colorado, and other states and territories: that on the 22d of September, 1891, the defendant published in its said newspaper, of and concerning the plaintiffs in their trade and business, the following false and libelous matter:

“Business Changes—McKenzie Lumber Company, Denver, Attached.”

There was no allegation of special damage.

When the case came on for trial, the plaintiff McKenzie was sworn as a witness, and had testified to the copartnership and business of the plaintiffs, when the defendant interposed a motion to exclude all further evidence for the plaintiffs, on the ground that the complaint did not state facts sufficient to constitute a cause of action, because the words, set forth, were not libelous *per se*; and, no special damage being alleged, the plaintiffs were not entitled to a recovery. The court sustained the motion, and instructed the jury to render their verdict for the defendant, which was done accordingly.

The ruling of the court in sustaining the motion and giving the instruction presents the only question which we are called upon to determine in the case. Were the published words actionable *per se*? We are of the opinion that they were. The law has special regard for the credit of merchants and traders; and words which impute to them insolvency, financial difficulty or embarrassment; or dishonesty or fraud, are actionable in themselves, without the necessity of alleging or proving special damages. Upon this proposition the authorities are unanimous. Townshend on Slander and Libel, 273, 276; Newell on Slander and Libel, 192, 195; Odgers on Libel and Slander, 30.

The courts in a variety of instances have applied this general doctrine to particular cases, a few of which we shall notice.

The words, "Joseph Hermann, brickmaker, is in the hands of the sheriff," were held actionable *per se*. *Hermann v. Bradstreet*, 19 Mo. App., 227.

In *Mott v. Comstock*, 7 Cowen, 654, the defendant, speaking of a certain sum of money then due and owing from the plaintiff, a merchant, to one Matthew Harris, said, "There is poor Harris, it is hard for him to lose his debt." These words were held actionable by the court, as implying that the plaintiff was insolvent and unable to pay the debt.

To say of a trader that his checks were dishonored is actionable. Townshend on Libel and Slander, 275.

In *Sewall v. Catlin*, 3 Wend. 292, the following words, spoken of the plaintiffs as merchants in answer to the question "Were there any failures yesterday?" "Not that I know of; but I understand there is trouble with the Messrs. Sewalls," were adjudged to be libelous *per se*. The learned judge, delivering the opinion of the court, says: "I am inclined to think the words were actionable in themselves, being spoken of the plaintiffs as merchants. The witness inquired of the defendant, 'if there were any failures yesterday;' to which he replied, 'Not that I know of, but I understand there is trouble with the Messrs. Sewalls.' This answer in connection with the interrogation, was most obviously calculated to convey an injurious impression in relation to the mercantile standing and credit of the plaintiffs. The witness had heard of no failures, but he had heard that the Sewalls were in trouble. Every person would understand from this expression, when used in reply to such a question, that the Sewalls were embarrassed, were very hardly pressed, and would probably fail, and such was the sense in which the witness understood them. Any words which in common acceptance imply a want of credit or responsibility, when spoken of a merchant, are actionable."

In this case, the words complained of are, "*Business Changes—McKenzie Lumber Company, Denver, Attached.*" What is the plain inference from this language? It is that a suit has been brought against the plaintiffs upon a partner-

ship liability, a writ of attachment issued in the case, and the property of the firm seized under the writ. The impression produced upon the mind of the general reader, would be that The McKenzie Lumber Company had contracted an indebtedness which it was unable or unwilling to pay. The language tends to impeach the solvency of the firm, or its integrity, or both, and is calculated to produce an impression unfavorable to the business reputation of the plaintiffs. Words of similar import have been held actionable when spoken merely, and their circulation therefore restricted; but when they are printed in a newspaper with the wide and general patronage of the Denver Times, they must of necessity be much more injurious.

The case of *Woodruff v. Bradstreet*, 116 N. Y. 217, is cited by defendant's counsel, as announcing a rule which should be applied to this case; and, tested by which, the words under discussion here would not be libelous, *per se*. That was an action for libel, founded upon the publication by the defendant of the following:

"Watertown.—Robinson, J. S., printer, binder and mfr., woolens. Judgment against him and C. T. Woodruff, \$4,000."

The court, in discussing the effect of these particular words, say:

"The recovery of a judgment does not necessarily import conceded default in payment of a debt. It is a matter of frequent observation that controversies, arising apparently out of an honest difference of opinion, go into the courts for determination. Litigation also not infrequently comes from causes in which is involved no personal credit or default. There is nothing in the defendant's report to indicate that the judgment was produced by any cause prejudicial to the credit of the plaintiff, and there is no presumption in that respect upon the subject in aid of the action."

But the court in speaking on the general doctrine applicable to such cases uses this language:

"The plaintiff was engaged in the business of manufacturing and selling brick in the city of Watertown. It must be

assumed that at the time of the publication he was in good financial and business standing, and that the publication as to him was false. His reputation in that respect was his property, and he had the right to its protection against defamation. And any published imputation against him in that relation, which could be so construed as to import insolvency, or a condition of financial embarrassment, would be ground for an action, because it is the policy of the law to afford protection to the credit of merchants and traders, for reasons which it is now unnecessary to repeat."

There is a manifest difference between that case and this. There is no necessary inference from the language which was the subject of that suit, that the judgment was on account of a default in the payment of a debt. To say that a judgment has been recovered against a man, without more, suggests no impugnement of his solvency or his integrity; and the plain sense of the words cannot be enlarged by innuendo. In this case, however, the words clearly imply embarrassment in the plaintiffs' partnership business. They will bear no other construction. If they convey the truth, there must have been a suit against the firm; the suit must have been brought upon an alleged firm liability; and the property of the firm must have been taken in attachment. Not only is suspicion cast upon the solvency or integrity of the firm, but its property, which, together with its reputation, is the foundation upon which its credit rests, is said to be in the custody of an officer. The words in question explain themselves, and innuendo was unnecessary. If their natural tendency was not to impair the credit of the plaintiffs, we are at a loss to conjecture what language would have that effect. The words are clearly actionable, and for the purpose of maintaining the suit it was unnecessary to allege or prove special damages. It was therefore error to exclude the evidence of plaintiffs and instruct the jury to find a verdict for the defendant.

The judgment will be reversed.

Reversed.

THE A. GAUTHIER DECORATING COMPANY, PLAINTIFF IN
ERROR, v. HAM ET AL., DEFENDANTS IN ERROR.

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1. PRINCIPAL AND AGENT.

No one is bound by the acts of an agent beyond the scope of his authority, nor by the acts of one who, without authority, assumes to be an agent.

2. ESTOPPEL.

One who knowingly permits another to clothe himself with apparent authority, or who recognizes and adopts the acts of another who has assumed to be his agent in such a manner as to induce third persons to deal with the apparent agent on his credit, is estopped to say that such party is not his agent, possessed of the requisite authority.

3. APPEARANCE, EFFECT OF.

An appearance by a corporation is, for the purpose of the action, conclusive evidence of its legal existence.

Error to the County Court of Arapahoe County.

Mr. T. J. O'DONNELL and Mr. W. S. DECKER, for plaintiff in error.

Mr. BRINTON GREGORY, for defendants in error.

THOMSON, J., delivered the opinion of the court.

Ham and Jones, partners in the feed business, sued The A. Gauthier Decorating Company, a corporation, before a justice, to recover the amount of two bills for horse feed, alleged to have been sold by them to the Decorating Company in February and March, 1892; and recovered judgment, from which the defendant appealed to the county court, where judgment was again given for the plaintiffs. The defendant brings the case here by writ of error.

In December, 1891, and again in January, 1892, Wright Gauthier, who was in the employ of the defendant, ordered from the plaintiffs a bill of feed for the defendant. The articles so ordered were furnished and delivered by the plaintiffs

to the defendant. In January, 1892, the plaintiffs presented to the defendant their bill for the goods furnished in December, and in February, for those furnished in January. Both these bills were paid by defendant's check on The American National Bank of Denver. On the face of the January check was the memorandum, "Ac. A. Gauthier," and on the face of the February check, the memorandum, "for A. Gauthier feed bill," which memoranda were written on the checks at the time they were drawn. In February, and the first half of March, the same Wright Gauthier ordered additional goods for the defendant from the plaintiffs, which were furnished as the others had been. On the first or second of March, a bill was rendered to the defendant for the February account, which was retained by it until after the middle of the month. The defendant then declined to pay the bill, saying it had nothing to do with it.

Wright Gauthier had no authority from the defendant to order any of the goods which plaintiffs had furnished; he was not its agent for that purpose; the goods were, as it appears, used by A. Gauthier as feed for his horses. This A. Gauthier was in the service of the defendant, as superintendent of its business, under a written contract, by the terms of which he was to receive two hundred dollars per month for his services and the use of three of his horses and wagons; the horses and wagons, however, to be kept at his expense. This arrangement with A. Gauthier was unknown to the plaintiffs, who supposed from the fact of the bills being paid by the defendant, that the goods were properly chargeable to it.

Counsel for defendant refer us to the well established doctrine that corporations are bound, and bound only, by the acts and contracts of their agent, done and made within the scope of their authority. This is unquestionable law; and in so far as a principal may be affected by the acts of an agent, or assumed agent, the application of the rule is not confined to corporations; it includes all principals; so that it may be said generally, that no principal is bound by the acts of an

agent outside of the authority conferred; or by the acts of one who assumes to be an agent and is without authority. But while this is true, cases frequently arise, in which, notwithstanding no direct authority was ever given, it would be inequitable to permit its existence to be denied. One cannot, even negligently, mislead another to his prejudice, and escape the consequences by disavowing his own acts; and if he permits another to clothe himself with an apparent authority, or recognizes or adopts the acts of a party who has assumed to be his agent, in such manner as to induce third persons to believe in the existence of the authority and the agency, and, so believing, to deal with such apparent agent on the credit of the principal, he will be estopped to say that such party was not his agent and in possession of the requisite authority. This is evidently the theory upon which the plaintiffs rely for an affirmance of their judgment, because they make no claim that Wright Gauthier was in possession of any actual authority in the premises; but their proofs are insufficient for the purpose. It clearly enough appears that the goods were ordered for the defendant, and a portion of them paid for by it; but there is no evidence that the defendant, at the time it made the payments, knew that the plaintiffs believed it to be the real purchaser. Such knowledge is essential to an estoppel or a ratification. If the bills which were paid were made out in the name of the defendant, in such manner as to indicate that the plaintiffs supposed they were dealing with it, that fact would probably be sufficient to charge it with knowledge, or at least to put it upon inquiry. The bills upon which this suit was brought are made out in that way, but there is no evidence as to the form of the bills which were paid. They were receipted by the plaintiffs and left with the defendant. Proper legal steps should have been taken to compel their production in court, and if these had been unsuccessful, parol evidence of their contents would have been received. The memoranda upon the checks, while they might indicate some private understanding between the defendant and A. Gauthier as to

the disposition of the goods, were no notice to the plaintiffs that the goods were not purchased on the defendant's account.

The plaintiffs were permitted, over the objection of the defendant, to prove its incorporation by parol. This was error. Such proof can be made only by an authenticated copy of its charter or certificate of incorporation. But the error was in no way prejudicial to the defendant. The defendant appeared and defended the suit in the justice court. The judgment there recites such appearance. It appealed from this judgment to the county court, and gave an appeal bond, executed in its behalf by its officers, apparently authorized for that purpose. It appeared in the county court, cross-examined witnesses and introduced evidence. It thus admitted its corporate existence, for if it had no existence it could not appear. It did more. The effect of its appeal bond was an affirmation of its incorporation, and it was in the county court by virtue of such affirmation. If a corporation appears to a suit, it cannot deny its own existence; and such appearance is conclusive evidence of its legal existence for the purposes of the pending case. *R. R. Co. v. Shirley*, 20 Kan. 660; *Seaton v. R. R. Co.*, 55 Mo. 416.

Proof of its incorporation was therefore unnecessary, and it suffered no harm from the incompetent evidence admitted; but because of the deficiency in the evidence, which we have mentioned, the judgment must be reversed.

Reversed.

ESKRIDGE, APPELLANT, v. RUSHWORTH ET AL., APPELLEES.

1. RECEIVER.

A receiver is a trustee and an officer of the court, is charged with the duty of managing the estate intrusted to his care with due regard to the rights of the litigants, and in such manner as, according to his best judgment, to preserve what has been committed to his care and bring it into court.

2. SAME.

Ordinarily a receiver would have no right to carry on a mercantile business of which he had been put in charge, otherwise than to dispose of the property turned over to him for the best price possible, and produce the funds for the benefit of those entitled to them.

3. SAME.

The litigants are concluded as to what a receiver does under an order entered by consent, providing his acts are brought within the scope of the order, and he is not by evidence *aliunde* shown to have been guilty of misconduct.

4. SAME.

Where an order appointing a receiver provided that he might continue the business of a certain store and "replenish the stock therein from the moneys received until said stock can be sold at a good and reasonable price, that none of the goods should be sold at public auction, but be disposed of in the course of trade," he is fully authorized to carry on the business of the store, and buy whatever in his judgment, reasonably and prudently exercised, should be essential to the execution of the terms and evident purpose of the order.

Appeal from the District Court of Conejos County.

Mr. IRA J. BLOOMFIELD and Mr. RUFUS K. BROWN, for appellant.

Mr. CHARLES A. JOHNSON and Mr. ADAIR WILSON, for appellee.

BISSELL, P. J., delivered the opinion of the court.

The case presented by this appeal lies within very narrow limits, and the determination of one question will settle the rights of the appellant. A short statement of the history of the case preceding the entry of the judgment complained of is essential to render the decision intelligible.

In 1889, Rushworth and Smith fell out concerning a business which they had been carrying on at La Jara, in Conejos county. Rushworth brought a suit against Smith, alleging a copartnership, praying an accounting, a dissolution and a winding up of the affairs of the concern. Smith took issue as to the existence of the copartnership, and likewise brought

a suit against Rushworth to recover certain moneys which he claimed to be due on sundry transactions between them. After these suits were brought, the issue as to the existence of the copartnership was submitted to a jury, which found this fact against Smith, and thus established the existence of the firm. Subsequently the two suits were consolidated, for it was conceded apparently that if there was a firm, Smith's claims against Rushworth concerned the partnership business. After the consolidation, Rushworth's interlocutory application to appoint a receiver to take charge of the firm's affairs and wind up the business was submitted, and by stipulation of the parties Lorenzo D. Eskridge was in August, 1889, appointed that receiver. The order of appointment contained this clause, "and it is further ordered and decreed that the said receiver may continue the business of the La Jara store and replenish the stock therein from the moneys received, until said stock can be sold at a good and reasonable price." The sole difference between the parties to this suit is over the interpretation of that clause. It appears that immediately after the parties agreed upon the order, Mr. Eskridge took possession of the store, and became what might well be termed a "country merchant." He employed the usual and necessary help to aid in his business, and proceeded to sell and dispose of the stock in the ordinary course of trade, and, to further his purpose and what he conceived to be the intent of the order, he replenished the stock from time to time by the purchase of such goods as were essential to the carrying on of the business at the store. These goods were not generally bought for cash, but as is the custom of merchants on the usual thirty days time, and ultimately as the bills came in they were liquidated out of the proceeds of the sales. It is this circumstance which has led to the dispute. The business was carried on until the court met at the ensuing term in the following June, when the receiver was called upon for a report. He filed a statement under the order and at various times amended it, until he had placed on file some six or seven statements concerning the execution of his trust. The

court made sundry orders concerning the matter, and finally in May, 1892, which was about three years after the original appointment, found that there was due from him the sum of \$1,179.75, which he was directed to pay into court by the 11th of July, 1892, for the benefit of whomsoever might be entitled to it. It will be seen that the controversy over the administration of the trust had been continued some two years before this final result was reached. In making the order, the court held that Eskridge was without authority to buy the goods with which he had replenished the stock, and that he had in violation of his trust bought the goods on credit, and was therefore disentitled to any allowance because of these purchases, or to any allowance for the proportionate disbursements attendant upon their disposition. In other words, the court adjudged that in winding up the estate, and settling the accounts of the receiver, he was to be charged with the goods which came into his hands originally, the moneys which he had collected on account of the debts due the firm, and was only to be credited with such proportion of his subsequent outlay as that result might bear to the sum total of the business. As the court put it, these matters stood in the ratio of six to twenty-three, and, in reference to all his expenditures and transactions, the court computed the result on such basis, and concluded that he owed the estate \$1,179.75.

There will be no attempt whatever to state the accounts of the receiver with the estate on the basis of the information which is contained in the record. This labor will be devolved upon the court below, which has, or can acquire, complete data for the determination of the rights of the parties under the rules which we may announce. The status of a receiver is well settled in the law. He is a trustee and an officer of the court, he is charged with the duty of managing the estate intrusted to his care, and he must see to it that this duty is performed with due regard to the rights of the litigants, and in such manner as according to his best judgment to preserve and bring into court what has been committed to

his care. It would ordinarily be true that he would have no right to carry on a mercantile business of which he had been put in charge, otherwise than to dispose of the property turned over to him for the best price possible, and produce the funds for the benefit of those entitled to them. Should he do otherwise, he doubtless would, in the absence of express authority, be liable for any damage which might occur. But the present case is not brought within the scope of that very well recognized rule. The only person contending for the enforcement of the order is Smith, one of the litigants, and he cannot be heard to complain of what the receiver did without some other showing than that in the record. The order under which Eskridge was appointed and which gave him authority to act was entered by consent. The parties are bound by its terms. They are concluded as to what Eskridge did under it, providing his acts can be brought within the scope of the order, and he is not by the evidence *aliunde* shown to have been guilty of misconduct. This last suggestion may be removed from our consideration, since the court expressly finds that what he did was under misapprehension of the orders of the court, and that there was in his doings no element of misfeasance or malfeasance. The naked question then remains whether the order justified the receiver in buying the goods as he did, and carrying on the trade regardless of the result. This conclusion seems to us irresistible. In addition to the specific provision already recited, the order directed that none of the goods or property of the partnership should be sold at public auction, and ordered that they should be disposed of in the course of trade, and that the debts should be liquidated from the moneys arising from such sales of the property. When we remember that the order specifically directed the receiver to replenish the stock, and continue the business of the store and dispose of the goods in due course of trade, we must find that he was fully authorized to carry on the business of the store and buy what, in his judgment, reasonably and prudently exercised, should be essential to the execution of the terms and evident purpose of the order. So far as we are now ad-

vised from the present record this was all that he did, and he was entitled on the showing which he made to have his account so taken and stated as to include his purchases, and the expenses ordinarily and necessarily incident to the carrying on of the business. This interpretation put upon the order is all that seems essential to enable the district court to properly state the account, so as to do justice and equity as between the parties. There is not enough in the record to enable us to say what sum ought to be allowed the receiver for his compensation. It is always true that wherever a person is put in charge of property, to preserve it *pendente lite*, and to dispose of it and bring the proceeds into court, he is entitled to a reasonable and fair compensation for the work which he does. Since, in this case, the receiver was ordered to continue the business and to carry it on for the benefit of the parties, he is entitled to a fair remuneration for his labor. Whether the percentage which the court fixed would, under our interpretation of the duties and rights of the receiver, be deemed reasonable, we are not advised. There is not enough before us to enable us to determine what that compensation should be, and we can only suggest that if the whole transaction is found to be fair and free from misfeasance, and the trust was exercised with that reasonable prudence which a receiver is bound to exercise, the compensation allowed would not appear commensurate with the labor. The court, of course, under well settled principles, is bound to take into consideration the manner in which the trust has been executed, and is quite at liberty, upon adequate showing in that regard, to either limit the pay or withhold it altogether. That the court may be fully advised as to our conclusions of the proper basis on which to proceed to enter the proper order, we will further suggest that, in our judgment, the receiver should not be charged with the losses which resulted from the ultimate sale of the goods by auction. The goods were so sold by the direct order of the court, and the parties are bound by the consequences of the order which they procured to be entered. Since we have holden the goods which the receiver purchased

a part and parcel of his trust, the loss on the sale of them would as legitimately become a part of his final account as any loss which may have occurred in the sale of the stock which originally came into his possession. This is enough to indicate to the court the basis on which the account should be taken and stated. No other question is presented by the record, and no matters have been considered or discussed by counsel in their briefs, save those which turn upon the proper construction and consideration of this order, and its proper construction is therefore the only matter decided by the court.

The order will be reversed, with directions to the court below to further proceed in conformity with this opinion.

Reversed.

THE REPUBLICAN PUBLISHING COMPANY, APPELLANT, v.
MINER, APPELLEE.

1. LIBEL—INNUENDO.

The office of an innuendo in pleading a libel is to explain the defendant's meaning in the language employed, and to show how it relates to the plaintiff. When the meaning of the language is plain no innuendo is required.

2. SAME.

Where the meaning of the language is not apparent, and an explanation is necessary, the innuendo is used to express the plaintiff's construction of the words, but it cannot enlarge or vary their sense, and it is of no avail unless the words to which it is applied have a violent presumption of the innuendo.

3. LIBEL DEFINED.

A libelous publication is one which charges or imputes to any person that which renders him liable to punishment; or which is calculated to make him the subject of hatred, odium, contempt or ridicule.

4. DIRECT CHARGES, NOT ESSENTIAL.

A publication, the obvious tendency of which, taken as a whole, is to fasten suspicion of guilt of a felony upon the plaintiff, is actionable, although the article contains no direct charge.

5. JUSTIFICATION. .

In an action for libel, the publication in a newspaper of rumors is not justified by the fact that such rumors existed.

Appeal from the District Court of Arapahoe County.

Mr. L. B. FRANCE, for appellant.

Mr. M. B. CARPENTER, and Mr. J. H. CROXTON, for appellee.

THOMSON, J., delivered the opinion of the court.

This is an action for libel, brought by Eliza J. Miner against The Republican Publishing Company. The only question to be determined relates to the sufficiency of the complaint. The defendant moved in arrest of judgment for the reason that the complaint did not state facts sufficient to constitute a cause of action, because the alleged libelous words set forth are not actionable *per se*. The motion was denied and judgment entered on the verdict. This action of the court is the subject of the only errors assigned.

The following is a copy of the alleged libelous publication, as set forth in the complaint, together with the innuendoes of the pleader:—

“ A FIENDISH ACT.

“ AN ATTEMPT AT MURDER BY THE POISONING OF THE FAMILY OF J. T. POTTER.

“ *Eight persons, after partaking of a meal, are stricken down by sickness, which proves to have been caused by arsenic administered in food.—The hidden mystery connected with the affair.—Condition of the patients.*

“ One of the most desperate attempts at murder the criminal annals of Arapahoe county record was made yesterday morning in the family of James T. Potter, an old citizen of Denver, residing at No. 865 Lawrence street, by means of arsenical poisoning. The facts in the case betray a most

deplorable condition of affairs, and indicate, if their establishment can be judiciously reached, the presence of a dangerous member of the community, whose apprehension and confinement should be at once directed by the authorities. At an early hour on Monday morning, the would-be victim of crime with his family—consisting of a wife and children, a married daughter with her children, and servant girl—breakfasted, after which Mr. Potter, who is in the employ of the Denver and South Park road, proceeded to his business. Nothing occurred to disturb the harmony of the household until about 9 o'clock. About that time Dollie Wilson, employed in the family, complained of feeling unwell, and, at the suggestion of Mrs. Potter, abandoned her household duties and retired. Nothing of any serious character was apprehended, and it was thought her illness would be succeeded by convalescence. Half an hour later one of the children of the family was sent to Miss Wilson's room to ascertain her condition, and if there was anything she required. Upon opening the door of her apartment the youthful messenger was startled at the spectacle which greeted her gaze. The occupant was discovered prone upon the bed, her eyes gazing into vacancy, her form transfixed, great drops of perspiration exuding from her brow, and the unfortunate woman apparently in the final pangs of dissolution. The alarm was at once given, and such remedies administered as the limited resources of the house in that behalf afforded. While means for her revival were being employed, Mrs. Bradford, a daughter of Mr. Potter, on a visit to her parents, was seized with pains in the back, followed by profuse vomiting and other symptoms of poison, and was compelled to retire to her room, when she became so violently ill that for the time being her life was despaired of. Soon after, her two children were similarly afflicted, and while they were being cared for by Mrs. Potter, that lady, with her four children, were compelled to yield and take to their beds. In the meantime Mr. Potter had departed the city for Dome Rock, a station on the Denver and South Park road, on official

business. He reached his destination almost at the hour his family was attacked, and while employed in the pursuit of the object of his mission was suddenly attacked with pains of the most violent character, investing his entire system, accompanied by vomiting and the attendant indication of poison. With the greatest effort he was able to reach the shelter of a tree, and his symptoms increasing in violence, he determined to gain the station and proceed home before he was incapacitated from travel. In this he was successful. He made out to reach the cars, which he boarded and came to Denver, arriving in the city late in the afternoon. En route hither his pains continued, but with the aid of friends he was supported until his destination was reached, when he was driven to his home and found his family as above described, every room in his house being allotted to the occupation of an invalid, none of whom had thus far received medical attendance. Upon his arrival, Mrs. Potter, by a wonderful exercise of will, arose from her bed of sickness and ministered to his necessities. Late in the day neighbors, who had been attracted by the strange occurrences of the day, called to ascertain the cause, and, learning the condition of affairs, improvised means at once for their comfort and recovery. Mr. Hurd, a son-in-law of the afflicted family, came soon after, and, uniting his exertions with those of others, soon had the invalids in a condition of comparative quiet, though the symptoms manifested still continued and refused to yield to such medicaments as had been administered. At one o'clock yesterday morning Dr. McBeth, the family physician, reached the afflicted family, and, after a careful diagnosis, decided the entire household were suffering from the effects of arsenical poison. He began a treatment at once to counteract its effect, and was greeted with but limited results at first, but assisted by those who had been summoned in view of the entire absence of nurses, he persevered, and by daylight had so far succeeded in his objects that the patients, with the exception of Miss Wilson, were pronounced in a fair way of recovery.

“ The cause of this mysterious attempt at the murder of a prominent and influential family, as stated, was arsenic, and an investigation of the means by which it could have been introduced into the household was begun. The house is supplied with water by the Holly system, and on examination of the hydrant, disclosed the presence of what remained of a coating of white powder, lining the escape pipe for several inches from its mouth. Last evening a reporter of the Republican called at the residence of the family and witnessed a most pitiful spectacle. Mr. Potter was found in bed, still suffering great pains, but hopeful that he would survive the attack. Mrs. Bradford, though up and about, was moaning with pain and apparently enduring great suffering. Her children, with those of Mrs. Potter's household, were entirely convalescent, while Miss Wilson was still confined to her bed with chances of recovery probable, rather than certain. Taken all in all, the situation, while more encouraging than could have been expected, was the reverse of cheerful, (meaning that an attempt had been made to commit the crime of murder upon the family of J. T. Potter by poison.)

“ In search of the author of this deplorable state of affairs, the reporter had his attention directed to a woman residing in the neighborhood, who is known under the historic pseudonym of ‘ Lucretia Borgia ’ (meaning this plaintiff), though more familiar to her neighbors and officers of the law as Liza Miner (meaning Eliza J. Miner, plaintiff in this action). She (meaning this plaintiff) is said to have attempted her own life on one or more occasions, failing in which she (meaning this plaintiff) has supplied the craving for death, by scattering what is supposed to have been poison about the neighborhood, to the death of dogs, chickens and household pets. The Borgia of the fourteenth century is represented as having been beautiful as the phantom of a dream—tall and commanding, with a form of matchless symmetry. The modern Borgia (meaning this plaintiff) is diametrically the reverse in nearly every instance. With regard to the alleged type of that character suspicioned in this case (meaning this

plaintiff), the reporter is unable to define her excellencies or deficiencies, for last night she (meaning this plaintiff) was invisible. The neighbors speak of her (meaning this plaintiff) as one who has been guilty of eccentricities that can be accounted for on no other hypothesis than insanity. A Mrs. Stearns insists that she (meaning this plaintiff) poisoned her cow in the spring of 1881, and that upon repeated occasions she has witnessed her (meaning this plaintiff) scattering substance on potato parings, vegetables, etc., which, upon examination, she found to be ground glass. On yesterday morning Mrs. Stearns found a couple of ham bones tied in a paper, upon which had been sprinkled a white powder, with the nature of which she was ignorant. A prominent citizen residing in the neighborhood mentioned a circumstance which came under his observation several years ago. Capt. Henderson and lady, employed in Snyder & Strong's book store, rented rooms of the Miner woman (meaning this plaintiff), who warned them to vacate, and they refusing, she (meaning this plaintiff) prepared a composition of brimstone, etc., which she (meaning this plaintiff) fired in the hall while Mrs. Henderson was asleep. The latter was awake during the smudging of the combustibles, and narrowly escaped with her life. The woman (meaning this plaintiff) subsequently stated to Mrs. Nichols, residing in the vicinity, that it was her intention to obtain possession of the rooms, even if she (meaning this plaintiff) was obliged to do so at the sacrifice of life.

"It may be anything or nothing, her (meaning this plaintiff's) alleged complicity, but the one thing certain about it all is that Mr. Potter's family have been poisoned (meaning that the plaintiff herein poisoned the Potter family, and attempted to commit the crime of murder), and it seems to be the duty of the officers to seek out and punish the guilty party or parties (meaning that the plaintiff herein had attempted to commit the crime of murder by poisoning the family of J. T. Potter, and should be punished according to the statute of the state of Colorado)."

The objections to the complaint, urged by defendant's coun-

sel, are, first, that the article complained of nowhere charges the plaintiff with the commission of any crime or offense, but is a statement merely of rumors existing in the neighborhood; and, second, that the innuendo with which the complaint concludes assumes that the publication charges the plaintiff with the violation of a statute, when there was no statute of this state defining the act mentioned in the innuendo as a crime or offense; that to charge one with an attempt to do an act is not actionable unless special damage be alleged; and that the plaintiff is bound by the innuendo.

The office of an innuendo in pleading is to explain the defendant's meaning in the language employed, and also to show how it relates to the plaintiff, when that is not clear on its face. It is not permitted to put upon the words a construction which they will not bear, or alter or enlarge their sense. It is only where the words are not *prima facie* libelous that an innuendo is necessary; so that where the meaning of the language is plain, and bears its own interpretation upon its face, no innuendo is required. Where the meaning is not thus apparent, and an explanation is necessary, the innuendo is used to express the plaintiff's construction of the words; but it cannot enlarge or vary their sense, and is of no avail unless the words to which it is applied have a violent presumption of the innuendo. *Castleman v. Hobbs*, Cro. Eliz. 428. But in such case the plaintiff must abide by the interpretation he has given; he cannot abandon it and adopt another.

Where, however, the obvious import of the words themselves is libelous, and no construction is needed, then the innuendo, if there be one, is superfluous; and no matter how much violence it may do to the language it purports to construe, it may be rejected as surplusage. The complaint is good without it. *Carter v. Andrews*, 33 Mass. 1; *Kraus v. Sentinel Co.*, 60 Wis. 425; *Bain v. Myrick*, 88 Ind. 137.

If the result of an examination of the article complained of is that it is actionable upon its face, then the innuendo becomes immaterial, and a decision of any question raised upon it will be unnecessary.

A libelous publication is one which charges or imputes to any person that which renders him liable to punishment; or, which is calculated to make him the subject of hatred, odium, contempt or ridicule. *Republican Pub. Co. v. Mosman*, 15 Colo. 399; *White v. Nichols*, 3 How. U. S. 266; *Hillhouse v. Dunning*, 6 Conn. 407; *Colby v. Reynolds*, 6 Vt. 489; *Dexter v. Spear*, 4 Mason, 115; 1 Hilliard on Torts, ch. VII, § 18.

Testing the publication in question by this definition, we have no hesitation in pronouncing it libelous on its face. It announces in startling headlines the commission of a fiendish act—an attempt at murder, by the poisoning of the family of James T. Potter. It proceeds to give the details of the atrocity, alleges a search for the author, and directs public attention to the plaintiff in such manner as would naturally cause suspicion to rest upon her as the would-be murderess. There is no direct charge, but there is insinuation, which may be equally injurious. A suspicion, instilled into the minds of the public, that the diabolical attempt at murder, which is described, was made by the plaintiff, might be as operative in overwhelming her with odium and contempt as a positive charge to the same effect. The obvious tendency of the publication, taken as a whole, is to fasten suspicion upon the plaintiff, and it is therefore actionable. *Starkie on Slander and Libel*, 12, 92; *Drummond v. Leslie*, 5 Blackf. 453; *Bain v. Myrick*, *supra*.

But the published article is libelous in other respects. It describes the plaintiff as having such a mania for destruction that she wreaked her vengeance on dogs, chickens and household pets, by scattering poison about the neighborhood; that she poisoned a cow; tried to take her own life; and attempted the destruction of a family, against whom she had some kind of a grudge, by a composition of brimstone, etc. Wanton and malicious acts like these would necessarily excite fear and abhorrence among her neighbors; and, as the complaint avers the charge that she committed them to be false, and the motion in arrest admits the truth of the complaint, the libelous character of the statement is unquestionable.

It is true that the writer does not make the various charges as of his own knowledge. He claims to derive his information from outside sources, sometimes giving his authority, and sometimes not; but it is plainly not mere rumors which he has repeated, as counsel urges; his language is too explicit for that; but even if it were, giving counsel the benefit of all he claims in this particular, still that would not vitiate the complaint, or be a bar to the action. This is not slander, it is libel; and the power of the press to make and unmake reputations is so great, that words, which would not be the subject of a suit, if spoken merely, are actionable when printed and published in a newspaper.

In *Skinner v. Powers*, 1 Wend. 451, the court say: "It cannot surely be necessary to go into an examination of authorities to show, that the publication in a newspaper of rumors is not justified by the fact that such rumors existed." See also, Starkie on Slander and Libel, 278, 279.

The court did not err in denying defendant's motion, and the judgment will be affirmed.

Affirmed.

3	576
8	343
9	542

3	576
d20	163

**BOARD OF COUNTY COMMISSIONERS OF GARFIELD COUNTY,
APPELLANT, v. LEONARD, APPELLEE.**

1. COUNTY COMMISSIONERS—DISCRETION.

The board of county commissioners is vested with full and sole power to manage the business affairs of the county, and with reasonable discretion in the administration thereof.

2. ALLOWANCE OF CLAIMS AGAINST THE COUNTY.

The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statute, either in express words or by implication. The compensation for every legitimate charge against a county is not fixed by statute, nor even expressly provided for. It is therefore within the power of the board in such cases to allow reasonable compensation.

3. REVIEW.

It seems that a subsequent board of county commissioners has no power to review the discretionary acts of a former board.

4. FRAUD AND MISTAKE.

Money obtained by fraud or mistake may be recovered, but when only an abuse of discretionary power is alleged it cannot be said to have been illegally obtained.

Appeal from the District Court of Garfield County.

Mr. J. L. Hodges and Mr. C. W. Darrow, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

The appeal in this case was prosecuted from a judgment on what purports to be the answer and cross complaint of the defendant in some existing suit. Neither the record nor abstract afford any information in regard to the nature or character of the original action in which the document was filed.

By sec. 57 of the Civil Code it is said in regard to counterclaims and as to what may be legally set up in an answer or cross complaint:

“First. A cause of action arising out of the transaction *set forth in the complaint*, or answer, as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action.

“Second. In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action.”

In the absence of all information in regard to the original suit, it is impossible to tell whether the alleged counterclaim was admissible in pleading, or whether proper subject-matter of any cross complaint under the first paragraph. It is clear from the nature of the claim, as disclosed in the pleading and by the evidence, that it did not originate in any contract, hence, was not proper under that paragraph. It is therefore impossible for this court, for want of proper data, to determine whether the cross complaint set up facts to constitute a cause of action.

In Bliss on Code Pleading, sec. 371, it is said, in speaking of matters that may be subjects of counterclaim under the first paragraph:—"The cause of action that may be thus counterclaimed must be one which arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." Whether this is the character of the claim attempted to be enforced we have no means of knowing. It may be treated as an original suit by this court, and the correctness of the judgment tested as in that class of cases.

It appears that appellee was, from January 10, 1888, to January, 1892, county clerk and *ex officio* clerk of the board of county commissioners of Garfield county. It is alleged that while so acting he illegally overcharged for alleged official services the sum of \$2,618.71, which claims were by him "presented for audit and allowance to said defendant board, his verified claims and demands against defendant county * * * pretending and asserting that this defendant was indebted to him in the various amounts for the various services set forth in said exhibits, and the then board of county commissioners of said county relying upon the pretensions, assurances and assertions of plaintiff, and at that time believing the said claims to be just and true and legal demands against said defendant county, paid the same." By which allegations it would appear, briefly stated, that the money was obtained by fraud and the presentation of false and fraudulent bills, in the verification of which he had been guilty of perjury.

It is very doubtful if any claim originating in tort or fraud comes within either of the classes of cases designated in the statute as affording basis for a counterclaim. The decisions upon the point are conflicting, but we do not find it necessary to definitely determine the question in this case. The allegation in the cross complaint is, that on different dates, from April 7, 1888, to January 11, 1890, appellee "presented for audit and allowance to said defendant board his certain verified claims and demands against defendant county in the

amounts and in the words and figures appearing in exhibits "A" to "O" inclusive, attached to and made part of the schedule of said cross demand or account of defendant against plaintiff, which is hereto attached and made part of this answer, pretending and asserting that this defendant was indebted to him in the various amounts for the various services set forth in said exhibits; and the then board of county commissioners of said county, relying upon the pretensions, assurances and assertions of plaintiff, and at that time believing the said claims to be just and true and legal demands against said defendant county, paid the same and all thereof to the aggregate of \$4,135.55, when in fact and in truth and as defendant has but recently learned, all that portion of said claims and demands specifically set out in said schedule, to the aggregate of \$2,618.71, was an overcharge and was not due plaintiff from defendant as pretended, asserted and assured by him, or otherwise due to him, and that defendant erroneously and by mistake paid plaintiff for those items of service contained in said schedule or account against plaintiff, in the amounts therein specified, aggregating \$2,618.71 as aforesaid, for many of which said items of service the statute prescribes no fees or other compensation, nor did said board by an exercise of discretion or otherwise than through error and mistake allow the same or any part thereof. And defendant says that by reason of such erroneous payments the plaintiff became and still remains indebted to defendant in the said sum of \$2,618.71."

In the schedules embraced (some ten printed pages), preceding each item, occurs the following:—"To illegal and excessive fees, and overcharges made and presented by said Leonard against and paid by said county in error and by mistake, and wrongfully charged and paid" or words of the same legal effect.

It is provided, Genl. Stat., sec. 521: "Each organized county within the state shall be a body corporate and politic." * * *

Sec. 523. "The powers of a county as a body politic and

corporate shall be exercised by a board of county commissioners therefor."

By sec. 538 it is said: "The board of county commissioners of each county shall have power." * * *

"Second. To examine and settle all accounts of the receipts and expenses of the county and to examine and settle and allow all accounts chargeable against the county, and when so settled they may issue county orders therefor as provided by law."

Sec. 545. "No account shall be allowed by the board of county commissioners unless the same shall be made out in separate items and the nature of each item stated, and where no specified fees are allowed by law, the time actually and necessarily devoted to the performance of any service charged in such account shall be specified, which account so made out shall be verified by affidavit."

The county commissioners therefore are invested with full and sole power to manage the business affairs of the county. "They are necessarily vested with reasonable discretion in the administration of county affairs." *Roberts v. The People*, 9 Colo. 458.

"The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statute, either in express words or by fair implication. In other words, in order to bind the county, the county commissioners must act within the scope of their authority. Where a claim is clearly not a legitimate charge against the county, the county commissioners have no power to allow it, and its allowance would neither bind nor estop the county; as, for example, where the commissions of a collector of taxes are fixed by statute at a certain rate per cent, and the board allows him a greater rate. But the compensation for every legitimate charge against a county is not fixed by statute, nor even expressly provided for. It is therefore within the functions of the board of county commissioners, in such cases, to allow reasonable compensation." *Roberts v. People (supra)*.

It clearly appears from the account set out in the pleading that the services were performed by the clerk in the line of his duty; that the accounts filed were itemized and each verified; submitted to a preceding board of county commissioners; allowed, and warrants drawn for them; that a subsequent board seeks to recover the money paid. It is not alleged that the services were not performed; that they were not in the line of official duty; that the money was obtained by fraud; that the several accounts were not duly itemized and verified; nor is it alleged that the amount charged was excessive. It goes to the entire charge in each instance, declaring the entire amount an overcharge and illegal, and allowing nothing for the services rendered.

Taking into consideration the power and discretion vested in the board; and the further fact, which is not denied, that the services were performed; and the language of the court in *Roberts v. People* (*supra*) in regard to the discretion vested in the board, how can it be said by a subsequent board that the allowance of the respective claims was not permissible in the discretion of the former board, and their action conclusive? And this presents the question. When there is neither fraud nor illegality in making the claims or in securing their allowance, can a subsequent board review the discretionary acts of a former board? We do not find it necessary to decide the question in this case, but reason and authority are both against it. It is true, as a general proposition of law, that money obtained by fraud or mistake can be recovered back, — modified in regard to mistakes in regard to the law. But when neither mistake of law nor fact is alleged, but only, perhaps, the abuse of discretionary power, how can it be said to have been paid by mistake, or to have been illegally obtained?

It would seem that counsel for the county labored under a misapprehension in regard to the law in supposing that the board had no discretion, and that all payments were illegal where the services were not prescribed and fees fixed, by

overlooking the necessary discretion vested in the board, and vitally necessary in the administration of county business.

The allegations in the cross complaint are insufficient, in the manner pleaded, to constitute a cause of action.

The judgment of the court in sustaining a demurrer to certain parts of the cross complaint and instructing the jury to find for the defendant (appellee) upon the pleadings, was warranted and must be affirmed.

Affirmed.

APPENDIX.

After the report of the case of *Dessauer v. Koppin*, ante 115, had gone to press, the original opinion was changed by the court by striking out the words "The plaintiff is entitled to enforce his claim against the copartnership property, and the partner who is served with process has clearly the right to insist that the firm assets shall be exhausted before the creditor shall resort to his individual property for the satisfaction of his claim," and inserting in lieu thereof, the following: "The plaintiff is entitled to enforce his claim against the copartnership property, and the partner who is served with process has clearly the right to turn out partnership assets for the satisfaction of the claim."

Appendix.	
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ERRATA.

In second line on page 199, read required instead of "requested."

On page 225, read In Cooley Const. Lim. 179 instead of "279."

On page 230, read Messrs. Howze & Willsea, for plaintiff in error.

On page 326, read Messrs. Doud & Fowler, for appellee.

INDEX.

ABANDONMENT: See **WATER RIGHTS.**

ACTIONS:

1. **ACTION ON INJUNCTION BOND.**—An action lies upon an undertaking in injunction against the principal and surety or sureties, without previous adjudication awarding damages against the principal. *Lynch v. Metcalf*, 131.

2. **ACTIONS ON OBLIGATIONS BEFORE MATURITY.**—The general rule that the maturity of the obligation is as essential as the existence of the debt to enable the plaintiff to bring suit, must control his right to recover, unless the case be brought within the statute permitting suit on an unmaturing debt. *Woods v. Tanquary*, 515.

3. **CAUSE OF ACTION.**—An action for dissolution of a partnership and accounting cannot be maintained when it appears that, by the acts of the parties, the partnership relations, if any existed, had been dissolved and an accounting had. *Gibson v. Glover*, 506.

4. **RIGHTS ASSIGNABLE.**—Almost every surviving right of action may be assigned so as to enable the assignee to maintain an action thereon in his own name. *Reddicker v. Lavinsky*, 159.

5. **STATUTORY ACTION—CONDITIONS PRECEDENT.**—To entitle a settler upon the public lands of the United States to maintain any of the actions mentioned in section 8 of chap. 90, Gen. Stats., he is required, as conditions precedent, to have his claim marked out so that the boundaries thereof may be readily traced and the extent of such claim easily known, and to be in actual occupancy of the claim or to have made improvements thereon to the value of one hundred dollars. *Martin v. Pittman*, 220.

6. **STATUTORY ACTION, HOW MAINTAINED.**—A statutory action cannot be maintained, except by showing a strict compliance with the requirements of the statute. *Ib.*

ADMINISTRATION:

1. **COSTS.**—Administrators are not chargeable with the costs incurred in a controversy between persons claiming to be distributees of the estate when there is nothing to show that they precipitated the contest, or in any way exceeded, in their official capacity, the limit of their duties. *Church v. Eggleston*, 239.

2. **FUNERAL EXPENSES.**—The estate of a deceased person is responsible for funeral expenses. *Hulbert v. Walley*, 250.

3. **SAME.**—The failure of the administrator to inventory the property belonging to the estate of the decedent does not render him or his estate liable for the payment of the decedent's funeral expenses. *Ib.*

4. **JURISDICTION.**—The county court has jurisdiction to order an administrator to bring into court funds in his hands belonging to the estate. *People v. County Court*, 425.

5. **PRACTICE.** When an administrator asserts a claim which in anywise tends to diminish the estate, he should procure the appointment of a representative of his trust. *Fetta v. Vandevier*, 419.

6. **WIDOW.**—A widow is not primarily responsible for the payment of a claim against the estate of her deceased husband. *Hulbert v. Walley*, 250.

AGENTS AND AGENCY:

1. **AGENT.**—An agent necessarily has a principal, and is bound to know who it is. *Benjamin v. Muttler*, 227.

2. **AUTHORITY.**—A servant can have no implied authority to do that which it could not be lawful under any circumstances for either him or his employer to do. *Sagers v. Nuckolls*, 95.

3. **SAME.**—It is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business in order that an authority to do it may be implied. *Ib.*

4. **SAME.**—No one is bound by the acts of an agent beyond the scope of his authority, nor by the acts of one who, without authority, assumes to be an agent. *Gauthier Decorating Co. v. Ham*, 559.

5. **ESTOPPEL.**—One who knowingly permits another to clothe himself with apparent authority, or who recognizes and adopts the acts of another who has assumed to be his agent in such a manner as to induce third persons to deal with the apparent agent on his credit, is estopped to say that such party is not his agent, possessed of the requisite authority. *Ib.*

6. **EVIDENCE.**—To establish an agency, in the absence of better evidence, it is common practice to resort to facts which tend to show recognition by the principal of the alleged agent's authority. Of this nature are communications between the principal and agent in which the authority of the latter is expressly or impliedly admitted. *Arthur v. Gard*, 133.

7. **SAME.**—The statements and representations of an agent made in reference to an act which he is authorized to perform, and while engaged in its performance, are binding upon the principal. They are part of the *res gestæ*. *U. P. R'y Co. v. Hepner*, 313.

8. **GENERAL AGENT.**—A person who is employed to manage a hotel is a general agent within the scope of the employment, and his principal is bound by his transactions properly pertaining to that business, but not by his acts beyond these limits. *Fisk v. Greeley Electric Light Co.*, 319.

9. **SAME.**—The manager of a hotel, to incur any responsibility on be-

half of his principal for the removal of old apparatus and fixtures, and replacing them with new, must have special authority from him for that purpose. *Ib.*

10. MINING PARTNERS.—A contract to engage in the business of prospecting for and developing mining property, for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other in prosecuting the joint adventure. *Abbott v. Smith*, 264.

11. RATIFICATION BY ADOPTION.—A party may not accept what has been done for him by one who is not his agent, and deny the power of the individual to act. If he adopts the acts by accepting the benefits of the transaction, he will be charged with a responsibility for the things done. *Markell v. Matthews*, 49.

12. RESPONSIBILITY.—An agent, to place a loan, is charged with the duty of a prudent and careful execution of his trust, and is responsible to the loser, if by his negligence the party loaning the money is induced to part with it on the strength of invalid or worthless securities. *Pettit v. Thalheimer*, 355.

13. SAME.—That the agent was imposed upon by another whom he trusted to transact the business in his behalf, affords no defense. *Ib.*

AGISTER'S LIEN: See LIENS.

AGREEMENTS: See CONTRACTS.

AMENDMENTS: See PRACTICE IN CIVIL ACTIONS.

APPEALS:

1. STATUTORY CONSTRUCTION.—The statute (Mills' Ann. Stat., sec. 4444), providing that a municipal corporation may take an appeal and have a writ of error made a *supersedeas* without bond, has no reference to an appeal from the county to the district court. *Pueblo v. Jackson*, 522.

2. SAME.—A municipal corporation cannot appeal from the county court to the district court without bond. *Ib.*

APPEARANCE:

EFFECT OF.—An appearance by a corporation is, for the purpose of the action, conclusive evidence of its legal existence. *Gauthier Decorating Co. v. Ham*, 559.

APPELLATE PRACTICE:

1. DEAD ISSUES, NOT DECIDED.—Where the disputes between parties have been settled pending appeal, the court will decline to determine any of the questions upon the record, and will dismiss the appeal. *Hunter v. Dickinson*, 372.

2. EXCEPTIONS—Where no exceptions were taken to the instructions given and they are not embraced in the record, an objection that the court erred in its instructions will not be considered. *Lewis v. Dodge*, 59.

3. SAME.—Erroneous action of the court below, which was made without objection and to which no exception was reserved, does not warrant a reversal. *Taylor v. Buckley*, 79.

4. **IMMATERIAL ERROR.**—Where the trial was to the court without a jury, and there was sufficient competent testimony to support the finding and judgment, there cannot be a reversal because the court erred in permitting to be brought to its attention incompetent evidence, for it will be assumed that this did not influence its conclusion. *Markell v. Matthews*, 49.

5. **SAME.**—Mere irregularities, resulting in no harm to the appellants, do not warrant a reversal. *Putnam v. Lyon*, 144.

6. **JUDGMENT.**—A judgment under review does not rest upon the reasons assigned by the court below. *McDonald v. McLeod*, 344.

7. **SAME, WHEN REVERSED.**—Where the verdict is clearly and manifestly against the evidence, it will be set aside in furtherance of justice. *Abbott v. Smith*, 264.

8. **SAME.**—Where the evidence does not tend to support the finding, the judgment will be set aside as being against the evidence. *Ib.*

9. **SAME.**—Where there is an entire absence of proof of a fact which must be established to entitle the plaintiff to recover, the judgment will be reversed. *D. & R. G. R. R. Co. v. Morton*, 155.

10. **SAME, WHEN NOT REVERSED.**—There are few exceptions to the general rule that appellate tribunals will not disturb judgments because of the insufficiency of proof, where they rest upon conflicting testimony and there is enough in the record to support the conclusion. *Amter v. Conlon*, 185. See, also, *Taylor v. Buckley*, 79; *Pierson v. Wilton*, 130; *Thorne v. Schumaker Piano Co.*, 183; *D. & R. G. R. R. Co. v. Morrison*, 194; *Fist v. Fist*, 273; *Hughes v. Coors*, 303; *City of Pueblo v. Pinckney*, 384; *Jones v. Sullivan*, 406; *Buno v. Gomer*, 456; *Beard v. Bliley*, 479; *McGranahan v. Barber*, 509; *U. P. Ry. Co. v. McCarty*, 530.

11. **OBJECTIONS.**—An objection to testimony will not, in general, be considered in a court of review, unless the record shows that the grounds of such objection were fairly presented to the trial court. It is only where the testimony is wholly inadmissible for any purpose that a general objection will suffice. *Curr v. Hundley*, 54.

12. **SAME.**—A valid assignment of error cannot be predicated upon an objection to the admissibility of evidence which was not preserved save by an exception to the testimony given by one witness, and the whole subject had been antecedently embraced in what had been offered and received without objection.—*D. & R. G. R. R. Co. v. Morrison*, 194.

13. **SAME.**—When evidence was admitted without objection, questions as to its competency will not be considered on review. *Zook v. Odle*, 87.

14. **ORDER.**—An order entered upon consent cannot be assigned as error. *Putnam v. Lyon*, 144.

15. **MODIFICATION OF JUDGMENT.**—The judgment appealed from may be modified by deducting the interest which was improperly included, and, as modified, affirmed. *Pettit v. Thalheimer*, 355.

16. **SAME.**—A judgment may be modified upon appeal. *Rio Grande S. R. R. Co. v. Deasey*, 196.

17. SAME.—That a judgment is erroneous with respect to the amount for which it was entered, does not necessarily require the remanding of the cause. The judgment may be modified and affirmed in this court. *Markell v. Matthews*, 49.

18. SAME.—When part of the recovery is erroneous, and it cannot be definitely ascertained what part could be legitimately sustained, the judgment cannot be modified and permitted to stand, but must be reversed. *Eaton v. Larimer & Weld Res. Co.*, 366.

19. SAME.—A judgment denying an injunction and dismissing the action, which was brought to restrain the commission of acts in anticipation of the consequence thereof being permanently injurious, may be affirmed without prejudice to another suit, when the actual result of the proceeding complained of is susceptible of proof, and can be shown to be permanently injurious and wrongful. *Cushman v. Highland Ditch Co.*, 437.

20. PARTIES.—Appellants are not permitted to complain in an appellate court for the first time that the proper parties were not brought into the litigation prior to the decree. *Putnam v. Lyon*, 144.

21. RECORD.—When the record is not prepared in conformity with the rules of court, the writ of error will be dismissed. *Hammond v. Herdman*, 379.

22. SAME.—Assignments of error based upon the giving of certain instructions will not be considered when all the instructions are not preserved in the record. *Ib.*

23. SAME.—Where there are no pleadings, and the evidence on which the case was tried is not preserved, the court's charge to the jury will not be reviewed. *Ib.*

24. SAME.—When the entire charge given to the jury is not embraced in the transcript or printed abstract, an assignment of error based upon the giving of a single instruction will not be considered. *Arthur v. Gard*, 133.

25. SAME.—An appeal may be dismissed for noncompliance with the rules of court in relation to abstracts and briefs. *McDonald v. McLeod*, 344.

APPROPRIATION: See WATER RIGHTS.

APPURTENANCES.

WATER RIGHTS.—Water rights are not appurtenances. *Bloom v. West*, 212.

ASSIGNMENTS: See also FRAUD.

1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—To vitiate a general assignment for the benefit of creditors there must be a fraudulent intention, followed by irregular and fraudulent disposition of the property; in other words, there must be either a reservation of the property, or such a disposition of it, that the proceeds will inure in some way to the benefit of the assignor. *Hunter v. Ferguson*, 287.

2. SAME.—The assignor must provide no benefit to himself other than

what may result from the payment of his debts; impose no condition upon the right of his creditors to participate in the fund; nor authorize delay on the part of the trustee. *Ib.*

3. SAME.—A person may make a legal assignment of all his property for the benefit of creditors, notwithstanding his assets may be in value many times the amount of his indebtedness, and an expectation of the surplus after the full payment of debts is not a badge of fraud. *Ib.*

4. RIGHTS ASSIGNABLE.—Almost every surviving right of action may be assigned so as to enable the assignee to maintain an action thereon in his own name. *Reddicker v. Lavinsky*, 159.

5. RIGHTS OF ASSIGNEE.—A party to whom a claim has been assigned, with authority to collect the amount due, has no right to collect a less sum, and bind his assignor thereby, unless the release be made on his own behalf and for moneys he had a right to collect beyond those which he received. *Moore v. Vickers*, 443.

6. REASSIGNMENT.—A party to whom a claim against another has been assigned may reassign it to his assignor, who becomes thereby re-invested with all his original rights to recover thereon. *Ib.*

ATTACHMENTS:

1. PRACTICE.—There must be a finding of the facts alleged as the basis of the attachment, and a formal entry declaring them to exist, in order to entitle the plaintiff to judgment for a debt not due. *Woods v. Tanquary*, 515.

2. SAME.—The issue formed by the traverse of the grounds of the attachment must be tried by jury, unless that mode of trial be waived by the parties. *Ib.*

BILLS AND NOTES:

1. COMMERCIAL PAPER—DEFENSES.—An indorsement of a promissory note after maturity passes the title, but does not prevent the maker from interposing any defense he had against the payee. *Woodbury v. Hinckley*, 210.

2. COMMERCIAL PAPER—PRACTICE.—Questions as to the ownership of the note sued on which was transferred after maturity are of no importance to the defendant. Such questions only become important when the transfer prevents a defense. *Ib.*

3. STATUTORY CONSTRUCTION.—In order to bring a claim within the provisions of sec. 103, Gen. Stats., it must appear that it is an instrument in writing acknowledging an indebtedness and promising payment, which may be made either in money or personal property. *Reddicker v. Lavinsky*, 159.

BONDS: See INJUNCTION BONDS.

BROKERS:

1. COMPENSATION.—An agent acting for both parties, for each without the knowledge of the other, can collect commissions from neither, but this rule is applicable only to agents *stricti juris*, and not to middlemen. *Manders v. Craft*, 236.

2. **SAME.**—Before a broker can be said to have earned his commission he must produce a purchaser who is ready, willing and able to purchase the property upon the terms and at the price designated by the principal, and he must have been the efficient agent or procuring cause of the sale. *Lawrence v. Weir*, 401.

3. **LIABILITY.**—An agent is liable in damages in all cases where he falsely affirms that he has authority, as he does when he signs the instrument as agent of his principal, knowing that he has no authority. He undertakes for the truth of his representation. *Benjamin v. Mattler*, 227.

BURDEN OF PROOF:

1. **FRAUD.**—Fraud is never presumed. The party relying upon fraud must prove it. *Beard v. Bliley*, 479.

2. **NEGLIGENCE.**—Negligence is the basis of a sleeping car company's liability to a passenger for the loss of wearing apparel. When its negligence is not shown, a judgment against it for such damages cannot be sustained. But when a loss is shown without negligence on the part of the passenger, the burden is then cast upon the company to show due care upon its part. *Pullman P. Car Co. v. Freudenstein*, 540.

3. **SUBSEQUENT PURCHASERS.**—Purchasers with notice of incumbrance are in no sense innocent, and, if they desire to exempt the property from the obligation of the incumbrance by proof that the paper it was executed to secure has been liquidated, the burden is upon them to show it. *Smith v. Stark*, 453.

CAUSE OF ACTION: See also ACTIONS:

PLEADING.—A complaint which shows that one F., having been found guilty of an offense, appealed with the plaintiff as surety on the appeal bond, that afterwards F., and the defendant, for the purpose of indemnifying the plaintiff as such surety, executed and delivered to him a bond conditioned that, "if the said F., shall duly appear at the said term of said court and answer the demand of the law thereat, then this obligation to be null and void, otherwise to remain in full force and effect;" that F. failed so to appear, and that in consequence the plaintiff as his surety was compelled to pay a large sum of money,—fails to state a cause of action. Such an instrument is not an indemnifying bond. *Slater v. Jacobitz*, 127.

CERTIORARI: See PRACTICE IN CIVIL ACTIONS.

CHANGE OF VENUE:

1. **JURISDICTION.**—An action to recover on a money demand growing out of a contract between the parties shall be tried in the county in which the defendants, or any of them, reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county, subject to the power of the court, upon good cause shown, to change the place of trial.

In such an action, service upon a defendant in a county other than

that in which the action is commenced, does not give the court jurisdiction without the acquiescence of the defendant. Where an application sufficient in form and uncontradicted, was made for a change of place of trial, the court had jurisdiction of the cause only for the purpose of ordering its removal to the proper county. *Pearse v. Bordeleau*, 351.

2. JURISDICTION ON APPEAL.—The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the re-submission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void. *Ib.*

CONSIDERATION:

1. CONSIDERATION, HOW SHOWN.—A duebill, which states upon its face that it was given on account of an act performed by the payee, shows that it was given upon a consideration. *Arthur v. Gard*, 133.

2. GUARANTY.—A guaranty executed subsequent to the original undertaking must rest upon a new and adequate consideration, in order to bind the guarantor. *Jain v. Giffn*, 90.

3. SAME.—Where the guarantor of the note in controversy was an original promisor and bound upon another note, which the payee refused to surrender without his guaranty of the note given in renewal thereof, the guaranty must be held as having been executed concurrently with the original undertaking and as a promise requiring no new consideration. *Ib.*

CONSTITUTIONAL LAW:

1. EMINENT DOMAIN.—The provision in the eminent domain act for preliminary possession and use of the property pending condemnation proceedings is not unconstitutional. *San Luis L. C. & I. Co. v. Kenilworth Canal Co.*, 244.

2. STOCK-KILLING ACT.—The railroad stock-killing act is unconstitutional. *Rio Grande W. Ry. Co. v. Vaughn*, 465.

3. TITLE OF ACT.—The words "and for other purposes" in the title of an act amount to nothing as a compliance with the constitutional requirement. Nothing which the act could not embrace without them can be brought in by their aid. *Pitkin County v. Aspen M. & S. Co.*, 223.

4. SAME.—New and different sections cannot be interpolated into a statute by an act the title of which is specifically limited to an amendment of one section and a repeal of others. *Ib.*

5. SAME.—The subject-matter of an act specifically amendatory of a designated section must be germane to the section amended. *Ib.*

6. WATER RIGHTS.—Section 6, art. 16 of the Constitution, which provides that "priority of appropriation shall give the better right, as between those using the water for the same purposes," applies to the respective rights of different parties, claiming the same interest adversely. *Bloom v. West*, 212.

CONTRACTS :

1. **CONTRACT AS TO MODE OF PAYMENT.**—Where the contract of employment involved an advancement by the employer of certain expenses to be incurred by the employee, which should be repaid by the work of the employee, the employer is bound to permit it to be repaid in that manner, and if he permits the employee to be involuntarily driven from the service by the violence of a co-employee, it may be held that the debt has been extinguished. *Hanlin v. Walters*, 519.

2. **MERGER OF EXECUTORY CONTRACT.**—An executory agreement for the sale of land is annulled and abrogated by the delivery and acceptance of a deed in pursuance thereof. It can no longer be resorted to for the purpose of ascertaining the terms on which the land was sold, unless it is shown by otherwise competent testimony that something remained to be done after the transfer of the title. *Keator v. Colo. Coal & Iron D. Co.*, 188.

CONTRIBUTORY NEGLIGENCE; See NEGLIGENCE.

CONVERSION :

EVICTION.—The eviction from premises of parties who are lawfully engaged in removing the tenant's property, the locking up of the premises, keeping them locked and preventing the removal of the chattels, is a conversion thereof, and a recovery may be had for their value. *Hughes v. Coors*, 303.

COSTS :

1. **COSTS.**—Costs were not allowed at common law, and are taxable only by force of the statute. *Larimer County v. Lee*, 177.

2. **SAME.**—The right to reimbursement for costs expended is statutory. In the absence of statute it does not exist. *Fremont County v. Wilson*, 492.

3. **COSTS ON APPEAL.**—Where the judgment is modified and affirmed, the costs of the appeal may be taxed against the respective parties equally. *Rio Grande S. R. R. Co. v. Deasey*, 196.

4. **COSTS IN CRIMINAL CASES.**—The term "costs," as used in sec. 969, Gen. Stats., includes whatever the law officers may legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial. *Ayres v. The People*, 117.

5. **COSTS IN EQUITY CASES.**—The taxation of costs in an equity case is largely within the discretion of the trial court and its action in this respect will not be disturbed, except where there has been a plain and palpable abuse of discretion. *Putnam v. Lyon*, 144.

6. **SAME.**—While the chancellor is allowed great discretion in adjudging costs, such discretion can only be exercised within well defined limits. *Church v. Eggleston*, 239.

7. **COUNTY'S LIABILITY.**—The county is liable for the costs of prosecution in a criminal case where the defendant is acquitted. *Fremont County v. Wilson*, 492.

8. **SAME.**—In case of the conviction of a defendant and of his inabil-

ity to pay the costs, the county is liable for the costs of prosecution. *Ib.*

9. SAME.—There is no liability against the county on account of services rendered by officers or witnesses on behalf of a defendant in a criminal case, unless he has availed himself of the provisions of the statute by obtaining an order of the court or judge that such witnesses be subpoenaed. *Ib.*

10. DEFENDANT'S LIABILITY.—Costs of the prosecution are recoverable of a defendant upon conviction of a crime. *Ib.*

11. EXPERT WITNESSES—FEES.—A physician who attends as a witness in obedience to a subpoena may be compelled to express his opinions on hypothetical questions, or on general medical and toxicological subjects, as an ordinary witness is compelled to testify on questions of fact within his knowledge, and for the same statutory fees. *Larimer County v. Lee*, 177.

12. SAME.—An expert cannot be compelled to do a particular thing, as to analyze the contents of a stomach, or perform a *post mortem* operation, by the ordinary process of subpoena, nor for an ordinary witness fee. *Ib.*

COUNTERCLAIM:

DAMAGES.—A defendant in an action in which a writ of attachment has been issued and levied cannot set up a counterclaim for damages sustained by reason of an excessive levy under the writ. *Esbensen v. Hover*, 467.

COUNTY:

1. COSTS IN CRIMINAL CASES.—The county is liable for the costs of prosecution in a criminal case where the defendant is acquitted. *Fremont County v. Wilson*, 492.

2. SAME.—In case of the conviction of a defendant and of his inability to pay the costs, the county is liable for the costs of prosecution. *Ib.*

3. SAME.—There is no liability against the county on account of services rendered by officers or witnesses on behalf of a defendant in a criminal case, unless he has availed himself of the provisions of the statute by obtaining an order of the court or judge that such witnesses be subpoenaed. *Ib.*

4. EXTRA COMPENSATION, NO JURISDICTION TO ALLOW.—The district court has no inherent or other power to allow compensation in excess of the statutory fees to experts to be called as witnesses in a criminal case. Such an order is not binding upon the county chargeable with the costs. *Larimer County v. Lee*, 177.

5. EXPENSES OF KEEPING PRISONER.—When a county has no jail, a justice of the peace is warranted in issuing a mittimus to the sheriff of another county to receive the prisoner and keep him in custody. The expenses of keeping such a prisoner rest upon the county where the offense is alleged to have been committed, and they must be paid in cash. *Montezuma County v. San Miguel County*, 137.

COUNTY COMMISSIONERS:

1. COUNTY FUNDS.—The board of county commissioners alone have

the right to disburse county funds, and to decide in what cases and under what circumstances they should be paid out, unless it be in those cases where fixed rights are conferred by statute. *Larimer County v. Lee*, 177.

2. DISCRETION.—The board of county commissioners is vested with full and sole power to manage the business affairs of the county, and with reasonable discretion in the administration thereof. *Garfield County v. Leonard*, 576.

3. SAME.—The rule governing the allowance of claims by the board of county commissioners is that the authority must be found in the statute, either in express words or by implication. The compensation for every legitimate charge against a county is not fixed by statute, nor even expressly provided for. It is therefore within the power of the board in such cases to allow reasonable compensation. *Ib.*

4. FRAUD AND MISTAKE.—Money obtained by fraud or mistake may be recovered, but when only an abuse of discretionary power is alleged it cannot be said to have been illegally obtained. *Ib.*

5. REVIEW.—It seems that a subsequent board of county commissioners has no power to review the discretionary acts of a former board. *Ib.*

COUNTY COURTS:

1. JURISDICTION.—County courts possess jurisdiction concurrent with the district court in all cases of which they may legitimately take cognizance, and the power to regulate and control the settlement of estates of deceased persons is expressly conferred upon them. *People ex rel. v. County Court*, 425.

2. SAME.—The county court has jurisdiction to order an administrator to bring into court funds in his hands belonging to the estate. *Ib.*

COVENANTS: See WARRANTY.

CREDITORS:

WHO ARE, UNDER STATUTE OF FRAUDS.—By the statute the term "creditors" includes all persons who are creditors of the vendor or assignor at any time whilst the goods and chattels sold remain in his possession or control. *Rizer v. McCarthy*, 348.

CRIMINAL LAW:

1. FORGERY.—Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *Colo. C. & T. Co. v. Grand Valley C. Co.*, 63.

2. INFORMATION.—It is the right of a defendant in a criminal case to be informed of the charges against him as fully as it is in the power of the prosecution to inform him, so that he may be enabled to intelligently prepare his defense. *Sault v. The People*, 502.

3. SAME.—Where a party is charged with larceny, the name of the person from whom the property was stolen; where with murder, the name of the person killed; where with receiving stolen goods, the name of the owner of the goods and the person from whom they were re-

ceived,—must be set out in the indictment or information; and only the inability to secure such names will excuse the failure to give them. *Ib.*

4. SAME—PRACTICE.—Where an information charges a defendant with receiving stolen goods from some person to the district attorney unknown, and where it appears from the evidence at the trial that, at the time of the preparation of the information, the name of such person was known to the district attorney, the defendant is entitled to his discharge. *Ib.*

DAMAGES:

1. EXEMPLARY DAMAGES.—To entitle a person to exemplary damages for a wrongful act there must be an element of fraud, malice, evil intent, or oppression entering into and forming a part of the act. *Eisenhart v. Ordean*, 162.

2. SAME.—Where there is no evidence in the case bringing it within the statute allowing exemplary damages, it is error to submit the question to the jury. *Ib.*

3. MEASURE OF DAMAGES.—Damages recoverable by a corporation in an action on an injunction bond are ordinarily limited to losses and injuries sustained by it by reason of the wrongful suing out of the writ. *Eaton v. Larimer & Weld Res. Co.*, 366.

4. SAME.—A corporation suing on an injunction bond running to it, cannot include in its claim for damages those which have incidentally fallen on its stockholders, without proof that it has been compelled to respond for a breach of some valid contract into which it had antecedently entered; and which it was prevented from performing by the bond in suit, or a showing that it has rightfully liquidated the claims asserted against it. *Ib.*

5. SAME.—In all cases (unless special damages are pleaded) where the consideration for which money was paid fails, and the purchaser has a right of action, the measure of damages is the amount paid and interest. *Jones v. Hayden*, 305.

6. RESCISSION.—Generally, where one fails to perform his part of a contract or disables himself from performing it, the other party may treat the contract as rescinded, and may elect either to sue for damages or to bring suit for a cancellation. *Boyes v. Green Mt. Falls T. & I. Co.*, 295.

7. WATER RIGHTS.—A judgment for damages for the diversion of water can only be based upon the ownership or right of property in the water, and the wrongful invasion of that right. *Cash v. Thornton*, 475.

DEBTOR AND CREDITOR:

1. PREFERENCE.—A debtor has the right to prefer his creditor. *Hunter v. Ferguson*, 287.

2. STATUTE OF FRAUDS.—By the statute the term "creditors" includes all persons who are creditors of the vendor or assignor at any time whilst the goods and chattels sold remain in his possession or control. *Rizer v. McCarthy*, 348.

DECREES: See JUDGMENTS.

DISCRETION:

1. AMENDMENTS.—The granting of leave to amend pleadings is entirely discretionary with the trial court, and, unless that discretion has been abused, appellate courts will not interfere. *Buno v. Gomer*, 456.

2. COUNTY COMMISSIONERS.—The board of county commissioners is vested with full and sole power to manage the business affairs of the county, and with reasonable discretion in the administration thereof. *Garfield County v. Leonard*, 576.

3. PLEADING.—A motion to compel the plaintiff to elect upon which of two counts in a complaint for the same cause of action he will proceed, is addressed to the discretion of the court. *Manders v. Craft*, 236.

4. RESCISSION.—The rescission or cancellation of contracts or deeds and specific performance are not matters of absolute right, but matters resting in the sound discretion of the court. *Boyes v. Green Mountain F. T. & I. Co.*, 295.

5. SPECIAL VERDICT.—It is discretionary with the jury to render a general or special verdict in an action for the recovery of money only, or of specific property. In such cases the court has no power to order special findings. *Meyers v. Hurt*, 392.

DITCHES: See WATER RIGHTS.

EMINENT DOMAIN:

1. CORPORATE PROPERTY.—The statute contemplates the institution of condemnation proceedings by one corporation against another, as well as by a corporation of a public character against the property of a private individual. *San Luis L. C. & I. Co. v. Kenilworth Canal Co.*, 244.

2. PRELIMINARY POSSESSION.—The provision in the eminent domain act for preliminary possession and use of the property pending condemnation proceedings is not unconstitutional. *Ib.*

3. STATUTORY CONSTRUCTION.—The provisions of section 1716, Gen. Stats., that no tract of improved or occupied land shall, without the written consent of the owner, be subjected to the burden of two or more irrigating ditches, when, etc., are for the benefit of the landowner, and cannot be invoked by rival ditch companies. *Ib.*

EMPLOYER AND EMPLOYEE:

1. AGENCY.—A servant can have no implied authority to do that which it could not be lawful under any circumstances for either him or his employer to do. *Sagers v. Nuckolls*, 95.

2. SAME.—It is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business in order that an authority to do it may be implied. *Ib.*

3. CONTRACT.—Where the contract of employment involved an advancement by the employer of certain expenses to be incurred by the employee, which should be repaid by the work of the employee, the employer is bound to permit it to be repaid in that manner, and if he per-

mits the employee to be involuntarily driven from the service by the violence of a co-employee, it may be held that the debt has been extinguished. *Hanlin v. Walters*, 519.

4. DAMAGES.—An employee who is discharged without cause before the expiration of the term of employment, is entitled to damages for the breach of the contract. *Manger v. Grodnick*, 534.

5. EMPLOYER'S LIABILITY.—The test of the liability of the master for the acts of his servant in all cases is whether the act was done by his express authority or fairly implied from the nature of the employment and the duties incident to it. *Sagers v. Nuckolls*, 95.

6. SAME.—To make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment. If he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more liable than a stranger. It is also imperative that the employment be in the prosecution of a lawful business. *Ib.*

7. EMPLOYEE'S LIABILITY.—A servant is liable in damages to a third person for the negligent performance of his master's business. *Miller v. Staples*, 93.

8. RELATION, WHEN CANNOT EXIST.—The relation of master and servant cannot exist in a conspiracy or confederation of individuals to commit crime,—all are principals and are jointly and severally responsible for the consequences of the wrong perpetrated. *Sagers v. Nuckolls*, 95.

9. SAME.—Where the principal, using due care in the selection of the person, enters into a contract with the person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, the contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, his agents or servants in the performance of the work. *Chicago R. I. & P. Ry. Co. v. Ferguson*, 414.

10. SAME.—An employment is regarded as independent when the person renders service in the course of an occupation representing the will of an employer only as to the result of the work, and not as to the means by which it is accomplished. *Ib.*

EQUITY:

DEED—MORTGAGE.—The power of a court of equity to hold as a mortgage an instrument which is in form an absolute deed, is well settled. *Fetta v. Vandevier*, 419.

ESTOPPEL:

1. EQUITABLE ESTOPPEL.—Where one, by his words or conduct, willfully causes another to believe a certain state of things and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as

existing at the same time. *Colo. Loan & Trust Co. v. Grand Valley Canal Co.*, 63.

2. **SAME.**—A corporation having sold the stock of a shareholder for a delinquent assessment, and bought in the stock itself with his acquiescence, is estopped to charge him with further assessments. It cannot, in such a case, assert the invalidity of its own proceedings and reinstate him as a stockholder. *Patterson v. Brown etc. Ditch Co.*, 511.

3. **SAME.**—One who knowingly permits another to clothe himself with apparent authority, or who recognizes and adopts the acts of another who has assumed to be his agent in such a manner as to induce third persons to deal with the apparent agent on his credit, is estopped to say that such party is not his agent, possessed of the requisite authority. *Gauthier Decorating Co. v. Ham*, 559.

EVICTIION.

1. **CONVERSION.**—The eviction from premises of parties who are lawfully engaged in removing the tenant's property, the locking up of the premises, keeping them locked, and preventing the removal of the chattels is a conversion thereof, and a recovery may be had for their value. *Hughes v. Coors*, 303.

2. **EVICTIION, WHAT DOES NOT CONSTITUTE.**—The mere fact that the premises became uninhabitable through the act of a third person, to which the landlord has not contributed, does not amount to an eviction, or discharge the tenant from the payment of rent. *Eisenhart v. Ordean*, 162.

3. **EVICTIION—INTENTION MATERIAL.**—Acts of a landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention that the tenant shall no longer continue to hold the premises. *Ib.*

EVIDENCE:

1. **APPEARANCE, EFFECT OF.**—An appearance by a corporation is, for the purpose of the action, conclusive evidence of its legal existence. *Gauthier Decorating Co. v. Ham*, 559.

2. **BOOKS OF ACCOUNT.**—Before books of account are admissible in evidence, a proper foundation must be laid for that purpose, and the books must be books of original entry and competent proof of the matters which they tend to establish. *Jones v. Henshall*, 448.

3. **FRAUD.**—The various agreements between the parties which showed the contract as originally entered into and as extended in its operation and conditions, and which were the result of the conversations wherein the alleged misrepresentations, which are the foundations of the action, were made, are admissible in evidence. *Lewis v. Dodge*, 59.

4. **NEGLIGENCE.**—Acts which follow an injury cannot be proven in civil actions for the purpose of establishing an antecedent negligence. That a railroad company aided in putting out a fire burning along its track does not tend to establish the fact that it caused the fire. *D. & R. G. R. R. Co. v. Morton*, 155.

5. **PAROL.**—Parol evidence is admissible to explain latent or inherent ambiguity in a written instrument, but not where its effect would be to make a new and different contract from that made by the parties. *Slater v. Jacobitz*, 127.

6. **PRESUMPTION.**—It being in the power of a railroad company to ascertain whether or not it had received goods for shipment, it is presumed to have ascertained that fact, and its failure to deny—except by way of answer to the complaint—that the goods were so delivered, is evidence of some weight that it had received them. *U. P. Ry. Co. v. Hepner*, 313.

7. **SAME.**—The production of the note by the plaintiff at the trial, showing payment of interest months after the date of its alleged payment, is sufficient to overcome any presumption arising from the record of a satisfaction of a mortgage securing a note of like description. *Smith v. Stark*, 453.

8. **SAME.**—Where a defendant neglected to go upon the stand and make clear by his own denials his want of connection with a purchase, the court is entirely warranted in concluding, even from slight testimony, the existence of those facts which would render him liable for the price of that of which he had received the benefit. *McDonald v. McLeod*, 344.

9. **RAILROAD FIRES.**—That a fire broke out and burned along the line of a railway, is not evidence that it was caused by the railroad company. *D. & R. G. R. R. Co. v. Morton*, 155.

10. **STATEMENTS TO THIRD PERSONS.**—Statements by a married daughter made to third persons that she intended, or expected to, or would pay her mother for taking care of her, are not evidence of a promise so to do. *Perkins v. Westcoat*, 338.

11. **STATUTE OF FRAUDS.**—Where the issue is as to whether an actual change of possession of the goods took place, the books of the warehouse in which they were stored at and after the time of the sale are admissible to show whether or not there has been such a change. *Springer v. Kreeger*, 487.

12. **VALUE.**—The value of articles which have no market value may be established by evidence of their cost, use and condition at the time they were destroyed. *U. P. D. & G. Ry. Co. v. Williams*, 526.

13. **SAME.**—The value of an article for which there is no home market may be ascertained by deducting the cost of transportation from the price to be obtained in the nearest market. *Ib.*

14. **WITNESS.**—The competency of a witness is not affected by the character of the testimony he may give. *Jones v. Henshall*, 448.

15. **SAME.**—In general, a party is absolutely incompetent to give evidence when he brings an action against an administrator or defends a suit brought by one. *Ib.*

16. **SAME.**—A creditor of an estate who has intervened in an action by the administrator against the heir, and who is interested in the suc

cess of the latter, has a right to object to testimony by the plaintiff in his own behalf. *Fetta v. Vandevier*, 419.

EXCEPTIONS: See APPELLATE PRACTICE.

EXECUTIVE POWER:

1. CONSTITUTIONAL LAW.—When powers are specially conferred by the constitution upon the governor, the legislature cannot authorize them to be performed by any other officer or authority; and from those duties which the constitution requires of him, he cannot be excused by law. *Lamb v. The People*, 106.

2. POWER OF APPOINTMENT.—By the amendatory act of April 1, 1891, the power to appoint the state veterinary surgeon is vested in the governor, subject to the approval of the senate. *Ib.*

3. STATE VETERINARY SURGEON.—The state veterinary surgeon is a state officer, and the power to remove him is by the constitution vested in the governor. *Ib.*

EXEMPLARY DAMAGES: See DAMAGES.

EXPERTS: See COSTS.

FEES: See COSTS.

FINAL RECEIPT:

EVIDENCE OF TITLE.—That the vendor holds only a final receipt, and not a patent for the land, is not a defect of which the purchaser can complain. *Godding v. Decker*, 198.

FORCIBLE ENTRY AND DETAINER:

1. JURISDICTION OF JUSTICE OF THE PEACE.—Justices of the peace have jurisdiction in actions of forcible entry and detainer, and such jurisdiction is not divested by a plea setting up that the defendant is in peaceable possession of the premises by virtue of certain conveyances. *Kelley v. Andrew*, 122.

2. PRACTICE.—The defendant in an action of forcible entry and detainer cannot set up title in himself and thereby defeat the plaintiff's right to recover on the basis of his peaceable occupancy. *Ib.*

3. TITLE.—A plaintiff in forcible entry and detainer cannot recover upon constructive possession evidenced by deeds conveying the fee. *Ib.*

4. SAME.—Ordinarily evidence of title is inadmissible in that action, either for the purpose of establishing the possession or character of the entry; but this rule is subject to an exception in the case of an occupant of a part of the public domain, where his muniments of title are admissible simply as evidences of staking and holding which he is required by statute to prove, in addition to his peaceable occupancy, to entitle him to maintain the action. *Ib.*

FORGERY:

FORGERY DEFINED.—Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *Colo. Loan & Trust Co. v. Grand Valley Canal Co.*, 63.

FRAUD: See also STATUTE OF FRAUDS.

1. **ACTUAL FRAUD.**—Actual or positive fraud consists in deception practised in order to induce another to part with property, or to surrender some legal right, and which accomplishes the end designed. The deception must relate to facts then existing or which had previously existed, and which were material to the dealings between the parties in which the deception was employed. In order to render it actionable, it should appear that the representations were made as alleged, that they were made in order to influence the plaintiff's conduct, that, relying upon them, the plaintiff did enter into a contract, or otherwise act as desired, that the representations were untrue, that the plaintiff suffered damage from the action he was induced to take, and that this damage followed proximately the deception. *Beard v. Bliley*, 479.

2. **BURDEN OF PROOF.**—Fraud is never presumed. The party relying upon fraud must prove it. *Ib.*

3. **SAME.**—Proof of fraud must be sufficient to overcome the legal presumption of honesty, which obtains in all cases. *Ib.*

4. **CONVEYANCES.**—Any alienation of property for the purpose of hindering, delaying or defeating creditors in subjecting the property to the payment of debts, is fraudulent. *Hunter v. Ferguson*, 287.

5. **DECEIT.**—An action for damages, as for deceit, is maintainable upon an executed contract. In order to prove such fraud as will sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff. *Barker v. Nichols*, 25.

6. **OPINION.**—A mere speculative statement or expression of opinion is not of itself a sufficient basis of an action for fraud. *Beard v. Bliley*, 479.

7. **PLEADING.**—Fraud must be pleaded to warrant the introduction of evidence concerning it. General allegations of fraud are insufficient. *Jain v. Giffin*, 90.

8. **SAME.**—Evidence of fraud is inadmissible, unless the facts constituting the fraud have been set up in the pleadings. *Arthur v. Gard*, 133.

GRANTOR AND GRANTEE: See VENDOR AND PURCHASER.
GUARANTY:

1. **CONSIDERATION.**—A guaranty executed subsequent to the original undertaking must rest upon a new and adequate consideration, in order to bind the guarantor. *Jain v. Giffin*, 90.

2. **SAME.**—Where the guarantor of the note in controversy was an original promisor and bound upon another note, which the payee refused to surrender without his guaranty of the note given in renewal thereof, the guaranty must be held as having been executed concurrently with the original undertaking and as a promise requiring no new consideration. *Ib.*

GARNISHMENT:

1. **NAME—NOTICE.**—A garnishee is not affected by a notice, writ or process served upon him, except it properly runs with an accurate description against the person to whom he may be indebted, unless he had actual knowledge of the identity of the debtor and the person named in the process. *German Nat. Bank v. Nat. State Bank*, 17.

2. **PRACTICE.**—A valid conditional judgment is a condition precedent to the issuance of a scire facias against a garnishee. *Rice v. American Nat. Bank*, 81.

3. **SAME.**—In order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, it is essential that there be service of process, or its equivalent, and he will not be bound by an independent submission of his rights by his debtor. *Ib.*

4. **SCOPE OF PROCESS.**—A garnishee is not chargeable unless the defendant could recover in his own name and for his own use that which the plaintiff seeks to secure by garnishment. **Hallowell v. Leafgreen*, 22.

5. **STATUTORY PROCEEDING.**—The authority to institute garnishee proceedings is entirely statutory, and unless the requirements of the statute are complied with the proceedings cannot be sustained. *Rice v. American Nat. Bank*, 81.

INFANTS AND INFANCY: See MINORS.**INFORMATIONS:**

1. **CRIMINAL LAW—INFORMATION.**—It is the right of a defendant in a criminal case to be informed of the charges against him as fully as it is in the power of the prosecution to inform him, so that he may be enabled to intelligently prepare his defense. *Sault v. The People*, 502.

2. **SAME.**—Where a party is charged with larceny, the name of the person from whom the property was stolen; where with murder, the name of the person killed; where with receiving stolen goods, the name of the owner of the goods and the person from whom they were received,—must be set out in the indictment or information; and only the inability to secure such names will excuse the failure to give them. *Ib.*

INJUNCTION BOND:

1. **ACTION ON INJUNCTION BOND.**—An action lies upon an undertaking in injunction against the principal and surety or sureties, without previous adjudication awarding damages against the principal. *Lynch v. Metcalf*, 131.

2. **MEASURE OF DAMAGES.**—Damages recoverable by a corporation in an action on an injunction bond are ordinarily limited to losses and injuries sustained by it by reason of the wrongful suing out of the writ. *Eaton v. Larimer & Weld Res. Co.*, 366.

3. **SAME.**—A corporation suing on an injunction bond running to it cannot include in its claim for damages those which have incidentally fallen on its stockholders, without proof that it has been compelled to respond for a breach of some valid contract into which it had antece-

dently entered, and which it was prevented from performing by the bond in suit, or a showing that it has rightfully liquidated the claims asserted against it. *Ib.*

INSTRUCTIONS:

1. **ERRONEOUS.**—Instructions which assume the existence of a fact in question are erroneous. *Chicago, R. I. & P. Ry. Co. v. Ferguson*, 414.

2. **ERRONEOUS, WHEN IMMATERIAL.**—Although an instruction ought not to have been given, yet, when it appears from the verdict that it occasioned no injury, it will be regarded as harmless error. *McClellan v. Hurdle*, 430.

3. **SAME.**—If the instructions, as a whole, convey to the jury the correct rule of law applicable to the question to be determined by them, the judgment will not be reversed because some one of them fails to state the law with sufficient qualification, when the defects are cured by other instructions. *Curr v. Hundley*, 54.

4. **SHOULD BE BASED UPON EVIDENCE.**—Instructions should in all cases be based upon the evidence, and an instruction that impliedly assumes the existence of evidence that was not given is erroneous. *Fisk v. Greeley Electric L. Co.*, 319.

5. **SAME.**—An instruction should not be given when there are no facts in evidence upon which it can be based. *McClellan v. Hurdle*, 430.

6. **SAME.**—Where there is no evidence upon which instructions in regard to fraud can be predicated, it is an error to give them. *Hunter v. Ferguson*, 287.

7. **SHOULD BE SPECIFIC.**—Instructions in an action for damages for personal injuries should be clear and definite as to facts, the existence of which would create a liability. *Denver etc. Transit Co. v. Dwyer*, 408.

8. **SAME.**—An instruction couched in such general and indefinite terms that the jury might easily draw an unwarranted inference from an admitted fact is vicious. *Fisk v. Greeley Electric L. Co.*, 319.

INTEREST:

1. **WHEN RECOVERABLE.**—Interest is recoverable only in the cases enumerated in the statute. *Pettit v. Thalheimer*, 355.

2. **SAME.**—Interest is recoverable only in those cases specified in the statute. Mere delay to pay is not necessarily “unreasonable and vexatious delay,” within the meaning of the statute. *Keys v. Morrison*, 441.

INTERVENTION:

1. **WHO MAY INTERVENE.**—Any person who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both, may intervene in the action. *Martin v. McCarthy*, 37.

2. **EFFECT OF DISMISSAL.**—A voluntary dismissal of an intervention, without any agreement of the parties or other circumstances tending to show that such dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action by the intervenor. *Ib.*

IRRIGATION: See **WATER RIGHTS.**

JUDGMENTS:

1. AGAINST PARTNERS.—When an action is brought against copartners to collect a firm debt, it is error to render judgment against one of the partners as for an individual debt. *Dessauer v. Koppin*, 115.

2. SAME.—The only judgment which can be entered in an action against a firm when all its members have not been served, or have not appeared, is one against the partners, to be enforced against partnership property and that of the member served. *Ib.*

3. SAME.—When an action is brought against copartners to collect a firm debt, it is erroneous to enter judgment against one of the parties, as for an individual debt. *Breene v. Booth*, 470.

4. FINAL JUDGMENT.—No final judgment can be properly entered without disposing of the case as to all the defendants served. *Goddin v. Decker*, 198.

5. REAL ACTIONS—LIEN FOR TAXES.—Where the plaintiff prevails in an action to recover land held by the defendant under a tax deed, the taxes paid thereon by the defendant constitute a lien upon the premises, and it is error to adjudge the property to the plaintiff without decreeing the payment of the same with statutory interest. *Mitchell v. Arkell*, 253.

6. WHEN VOID.—A decree of divorce based upon constructive service is void unless the record shows a strict compliance with all the statutory requirements. *Roberts v. Roberts*, 6.

JURISDICTION:

1. JUSTICE'S COURT.—The amount indorsed upon the summons issued by the justice of the peace as the amount of the plaintiff's claim concludes the plaintiff as to the amount of his recovery, unless in some legal and recognized manner it be changed. *Myer v. Helland*, 536.

2. SAME.—Service of process, requiring an appearance before a justice of the peace at an impossible date, confers no jurisdiction over the person served, and a judgment based upon such service is void. *Rice v. American Nat. Bank*, 81.

3. SAME.—The day and hour fixed in the summons for its return is the time when the justice's jurisdiction of the action attaches, and not when he issues the writ. *Ib.*

4. SAME.—A valid conditional judgment is a condition precedent to the issuance of a *scire facias* against a garnishee. *Ib.*

5. SAME.—In order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, it is essential that there be service of process, or its equivalent, and he will not be bound by an independent submission of his rights by his debtor. *Ib.*

6. SAME.—Justices of the peace have jurisdiction in actions of forcible entry and detainer, and such jurisdiction is not divested by a plea setting up that the defendant is in peaceable possession of the premises by virtue of certain conveyances. *Kelley v. Andrew*, 122.

7. COUNTY COURTS.—County courts possess jurisdiction concurrent

with the district court in all cases of which they may legitimately take cognizance, and the power to regulate and control the settlement of estates of deceased persons is expressly conferred upon them. *People ex rel. v. County Court*, 425.

8. SAME.—The county court has jurisdiction to order an administrator to bring into court funds in his hands belonging to the estate. *Ib.*

9. SAME.—Original jurisdiction to admit a will to probate and to proceed to such final determination as shall settle the rights of all parties concerned is vested in the county courts. *Mitchell v. Hughes*, 43.

10. SAME.—It is erroneous to enter judgment in a case on appeal from a justice of the peace in excess of the amount indorsed upon the back of the summons. *Myer v. Helland*, 536.

11. DISTRICT COURTS.—The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the re-submission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void. *Pearse v. Bordeleau*, 351.

12. SAME.—The district court has no inherent or other power to allow compensation in excess of the statutory fees to experts to be called as witnesses in a criminal case. Such an order is not binding upon the county chargeable with the costs. *Larimer County v. Lee*, 177.

13. SAME.—A court of equity will not entertain jurisdiction to set aside the probate of a will unless some special and exceptional circumstances be averred which warrant the interference. *Mitchell v. Hughes*, 43.

14. COURT OF APPEALS.—Constitutional questions are without the final jurisdiction of this court, and are never considered, unless essential to the settlement of the rights of the parties to the controversy. *Carlile v. Hurd*, 11.

15. CONSTRUCTIVE SERVICE.—A decree of divorce based upon constructive service is void unless the record shows a strict compliance with all the statutory requirements. *Roberts v. Roberts*, 6.

16. SAME.—The record must show a compliance with the statute respecting the mailing of a copy of the summons to the defendant to justify the entry of a judgment. *Ib.*

17. SAME.—Parol proof that the defendant has actual knowledge of the pendency of the action will not be considered on the hearing of his motion to set aside the judgment, because of the failure to mail him a copy of the summons, as required by law. *Ib.*

18. MANDAMUS—EQUITY.—The court below was without jurisdiction, in an application for *mandamus*, to hear and determine the equities between the petitioner and an intervenor, even by request and agreement of the parties. *Bright v. Farmer's Highline C. & R. Co.*, 170.

19. VENUE.—An action to recover on a money demand growing out

of a contract between the parties shall be tried in the county in which the defendants, or any of them, reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county, subject to the power of the court, upon good cause shown, to change the place of trial. In such an action, service upon a defendant in a county other than that in which the action is commenced, does not give the court jurisdiction without the acquiescence of the defendant. Where an application, sufficient in form, and uncontradicted, was made for a change of place of trial, the court had jurisdiction of the cause only for the purpose of ordering its removal to the proper county. *Pearse v. Bordeleau*, 351.

JURY:

1. SPECIAL PRACTICE IN CERTAIN COUNTIES.—Either party to an action pending in the county court of a county of the first class is entitled to a trial by jury without advancing the fees therefor. *Woods v. Tanquary*, 515.

2. JURY TRIAL IN ATTACHMENT.—The issue formed by the traverse of the grounds of the attachment must be tried by jury, unless that mode of trial be waived by the parties. *Ib.*

JUSTICES OF THE PEACE:

1. FORCIBLE ENTRY AND DETAINER.—Justices of the peace have jurisdiction in actions of forcible entry and detainer, and such jurisdiction is not divested by a plea setting up that the defendant is in peaceable possession of the premises by virtue of certain conveyances. *Kelley v. Andrew*, 122.

2. JURISDICTION.—The amount indorsed upon the summons issued by the justice of the peace as the amount of the plaintiff's claim concludes the plaintiff as to the amount of his recovery, unless in some legal and recognized manner it be changed. *Myer v. Helland*, 536.

3. WHEN JURISDICTION ATTACHES.—The day and hour fixed in the summons for its return is the time when the justice's jurisdiction of the action attaches, and not when he issues the writ. *Rice v. American Nat. Bank*, 81.

4. MITTIMUS TO JAIL OF ANOTHER COUNTY.—When a county has no jail, a justice of the peace is warranted in issuing a mittimus to the sheriff of another county to receive the prisoner and keep him in custody. *Montezuma County v. San Miguel County*, 137.

5. PRACTICE IN JUSTICE COURT.—Whenever the act regulating the jurisdiction of justices of the peace provides the remedies when a litigant's rights are not respected by the magistrate, such remedies are exclusive. *Wood v. Lake*, 284.

6. SAME.—The provisions of the statute requiring the summons issued by a justice of the peace to specify the place, day and hour at which the party summoned must appear before him, are mandatory and must be strictly pursued. *Rice v. American Nat. Bank*, 81.

7. PROCESS, WHEN VOID.—Service of process, requiring an appearance

before a justice of the peace at an impossible date, confers no jurisdiction over the person served, and a judgment based upon such service is void. *Ib.*

8. PROCESS, WHERE SERVED.—Service of process from a justice's court cannot, under the statute, be made beyond the county, and the acceptance of service which shows that it was made outside of the county thereby shows that it was made where the process had no legal force. *Ib.*

LANDLORD AND TENANT:

1. LANDLORD, WHEN LIABLE.—To render a landlord liable in an action for wrongful eviction, the acts complained of must either have been perpetrated by him, be acts for which he was personally responsible, or acts against which he had expressly covenanted. *Eisenhart v. Ordean*, 162.

2. LANDLORD, WHEN NOT LIABLE.—Tenants who have covenanted that they received the premises in good order and condition; that they would keep them in good repair at their own expense, and yield them up at the end of the term in as good order and condition as when entered upon,—loss by fire, inevitable accident or ordinary wear excepted,—cannot hold the landlord responsible for the result of acts of an adjoining lot owner upon his own premises. *Ib.*

3. TENANT, LIABILITY OF.—Under an express covenant to keep and leave the premises in repair, the tenant is bound to make good any injury from any cause not resulting from the act or neglect of the landlord. *Ib.*

4. EVICTION, WHAT DOES NOT CONSTITUTE.—The mere fact that the premises became uninhabitable through the act of a third person, to which the landlord has not contributed, does not amount to an eviction, or discharge the tenant from the payment of rent. *Ib.*

5. EVICTION—INTENTION MATERIAL.—Acts of a landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention that the tenant shall no longer continue to hold the premises. *Ib.*

LIBEL:

1. LIBEL DEFINED.—A libelous publication is one which charges or imputes to any person that which renders him liable to punishment; or which is calculated to make him the subject of hatred, odium, contempt or ridicule. *Republican Publishing Co. v. Miner*, 568.

2. DIRECT CHARGES, NOT ESSENTIAL.—A publication, the obvious tendency of which, taken as a whole, is to fasten suspicion of guilt of a felony upon the plaintiff, is actionable, although the article contains no direct charge. *Ib.*

3. LIBELOUS WORDS.—The publication of words concerning merchants and traders which impute to them insolvency, financial difficulties or embarrassment, dishonesty or fraud, are actionable in themselves, without the necessity of alleging or proving special damages. *McKenzie v. Denver Times Publishing Co.*, 554.

4. **SAME.**—The publication of the words "Business Changes—McKenzie Lumber Company, Denver, Attached," is libelous *per se*. *Ib.*

5. **PLEADING—INNUENDO.**—When the words published explain themselves, an innuendo is unnecessary. *Ib.*

6. **SAME.**—The office of an innuendo in pleading a libel is to explain the defendant's meaning in the language employed, and to show how it relates to the plaintiff. When the meaning of the language is plain no innuendo is required. *Republican Publishing Co. v. Miner*, 568.

7. **SAME.**—Where the meaning of the language is not apparent, and an explanation is necessary, the innuendo is used to express the plaintiff's construction of the words, but it cannot enlarge or vary their sense, and it is of no avail unless the words to which it is applied have a violent presumption of the innuendo. *Ib.*

8. **RUMORS.**—In an action for libel, the publication in a newspaper of rumors is not justified by the fact that such rumors existed. *Ib.*

LIENS: See also **MECHANICS' LIENS**.

1. **AGISTOR'S LIEN.**—It seems that the lien of an agistor, which had its inception prior to the giving of a chattel mortgage upon the property, which is taken with knowledge of the situation of the stock, is superior to that of the mortgage. *Tabor v. Salisbury*, 335.

2. **SAME.**—Where the stock was not intrusted to the ranchman to be fed, but remained in the custody of the owner, and the ranchman simply sold the feed which was consumed by the animals, and had no other custody of them than that which flowed from permission to use his yards for feeding purposes, he has no lien. *Ib.*

3. **BOARDING HOUSE KEEPER'S LIEN.**—A boarding house keeper has no lien upon the baggage of his guest, or right to hold the same to secure the payment of a demand, except for board and lodging. *Hanlin v. Walters*, 519.

4. **REAL ACTIONS—LIEN FOR TAXES.**—Where the plaintiff prevails in an action to recover land held by the defendant under a tax deed, the taxes paid thereon by the defendant constitute a lien upon the premises, and it is error to adjudge the property to the plaintiff without decreeing the payment of the same with statutory interest. *Mitchell v. Arkell*, 253.

LIMITATIONS:

1. **NEW PROMISE.**—The principle upon which a part payment by a debtor will prevent his availing himself of the bar of the statute is, that such a payment amounts to an acknowledgment of the debt, and from an absolute acknowledgment the law implies a new promise founded upon the old consideration. *Sears v. Hicklin*, 331.

2. **SAME.**—To raise such implied promise, the payment must be voluntary, and by the debtor to the creditor. *Ib.*

3. **SAME.**—A general admission of indebtedness is insufficient to raise such implied promise. There must be no uncertainty as to the particular debt to which the admission applies, and it must be positive and unconditional. *Ib.*

MANDAMUS:

1. **MANDAMUS.**—*Mandamus* is a purely legal, civil proceeding,—no element of equity or application of equitable law is or can be involved. *Bright v. Farmers' Highline C. & R. Co.*, 170.

2. **SAME.**—The writ of *mandamus* runs to an inferior tribunal, board, corporation or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. *Ib.*

3. **SAME.**—The right to the writ must be clear and unquestionable and the performance of the duty specifically imposed. It does not lie to enforce private contracts. *Ib.*

4. **JURISDICTION—EQUITY.**—The court below was without jurisdiction in an application for *mandamus*, to hear and determine the equities between the petitioner and an intervenor, even by request and agreement of the parties. *Ib.*

MARKET VALUE:

VALUE.—The value of an article for which there is no home market may be ascertained by deducting the cost of transportation from the price to be obtained in the nearest market. *U. P. D. & G. Ry. Co. v. Williams*, 526.

MARRIED WOMEN:

1. **TESTAMENTARY POWER.**—At common law a *feme covert* was incapable of disposing of a freehold estate by will. *Mitchell v. Hughes*, 43.

2. **SAME.**—Under the statutes of this state a married woman is, as against her husband, under disability to dispose of more than one half of her estate by will. *Ib.*

MASTER AND SERVANT: See **EMPLOYER AND EMPLOYEE.**

MEASURE OF DAMAGES: See **DAMAGES.**

MECHANIC'S LIEN.

1. **ASSIGNEE.**—A lien is given to those who shall do work or furnish material by contract, express or implied, with the owner. But the assignee of a laborer's claim can recover only by alleging and proving a specific sum due his assignor by reason of labor performed under a contract, and that by virtue of the assignment he succeeded to it. *Hanna v. Colo. Savings Bank*, 28.

2. **CONTRACT.**—The right of a material man to maintain a lien against the property of another depends entirely upon a contract, express or implied, with the owner of the realty, or an agreement between the owner and a contractor under whom he can show a derivative right. *Groth v. Stahl*, 8.

3. **SAME.**—It seems that since the right to a lien is dependent upon a contract, a subcontractor can acquire no other or greater rights than flow to him therefrom, and that it must be adjudged that his rights are to be taken as limited and controlled by the terms of the agreement between the original parties. *Ditto v. Jackson*, 281.

4. **NOTICE.**—A party who claims a mechanic's lien is required to file

his notice in the county where the property is situate. And, where it extends into or through several counties, the notice must be filed in each county. *Arkansas River L. R. & C. Co. v. Flinn*, 381.

5. **SAME.**—A statement filed by one claiming to be the assignee of numerous demands which sets forth the aggregate amount of indebtedness, but does not show the balance due with respect to each separate claim, is defective and insufficient. *Hanna v. Colo. Savings Bank*, 28.

6. **PLEADING.**—While the statute giving liens to mechanics and others should be liberally construed in favor of those entitled to invoke it, such facts should be stated in the complaint as show a full compliance with its provisions and that the plaintiff has a claim that he has a legal right to enforce. *Ib.*

7. **SAME.**—To entitle a plaintiff to maintain a suit to foreclose a mechanic's lien he must, in his complaint, allege everything essential to the existence and establishment of his claim, and by allegations—both specific and general—bring himself literally within the terms of the statute. *Arkansas River L. R. & C. Co. v. Flinn*, 381.

8. **PROOF.**—The right of a material man to claim and hold a lien must be maintained by proof bringing it directly within the statute. *Groth v. Stahl*, 8.

9. **STATUTORY CONSTRUCTION.**—Lien statutes being in derogation of the common law are to be strictly construed. *Arkansas River L. R. & C. Co. v. Flinn*, 381.

10. **SAME.**—The right of mechanics and others to a lien and the remedy for enforcing it are purely statutory, and the sufficiency of a complaint to foreclose it can be tested only by statutory provisions. *Hanna v. Colo. Savings Bank*, 28.

MERGER.

EXECUTORY CONTRACT.—An executory agreement for the sale of land is annulled and abrogated by the delivery and acceptance of a deed in pursuance thereof. It can no longer be resorted to for the purpose of ascertaining the terms on which the land was sold, unless it is shown by otherwise competent testimony that something remained to be done after the transfer of the title. *Keator v. Colo. Coal & Iron D. Co.*, 188.

MINES AND MINING.

1. **MINING LAW.**—If a locator of a mining claim permits an adjoining claimant to obtain a patent for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he loses title to whatever territory is embraced within the limits of his claim. *Miller v. Girard*, 278.

2. **MINING PARTNERS.**—A contract to engage in the business of prospecting for and developing mining property for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other in prosecuting the joint adventure. *Abbott v. Smith*, 264.

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4. **NEGLIGENCE.**—Knowingly suffering an obstruction, over which a wagon or carriage could not safely pass, to remain in a public and traveled street, is negligence *per se* on part of a city. *Ib.*

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ment of the contract as to future enterprises. Proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement. *Ib.*

3. WHAT CONSTITUTES A PARTNERSHIP.—The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced and carried on, there is a partnership. *Ib.*

4. SAME.—There may be a copartnership with reference to a single enterprise. *McDonald v. McLeod*, 344.

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1. ADMISSIONS.—Facts alleged in the complaint and not denied by the answer are to be taken as true, without proof. *Putnam v. Lyon*, 144.

2. FACTS.—Facts and not conclusions of law should be pleaded. *Farmers Ind. Ditch Co. v. Agricultural Ditch Co.*, 255.

3. FRAUD.—Fraud must be pleaded to warrant the introduction of evidence concerning it. General allegations of fraud are insufficient. *Jain v. Giffin*, 90.

4. GENERAL ALLEGATIONS.—A general allegation of delay, even though it be averred to have been vexatious and unreasonable, would be insufficient if challenged in apt time by demurrer or motion; but such an allegation is not so totally defective that proof could not be introduced thereunder, and is sufficient to support a judgment for interest. *Keys v. Morrison*, 441.

5. INDUCEMENT.—In an action by the assignee of a void county warrant against the assignor, the allegations in the complaint in regard to the warrant can only be regarded as inducement or as explanatory of the cause of action, while the cause of action for which recovery could be had is the amount of money advanced, with interest. *Jones v. Hayden*, 305.

6. JOINDER OF CAUSES OF ACTION.—Several causes of action which do not affect the parties in the same character and capacity may not be united in the same complaint. *Faust v. Smith*, 505.

7. JUDGMENT ON THE PLEADINGS.—Where the facts constituting a cause of action are specially admitted by the answer, a judgment may be entered against the defendant on the pleadings, notwithstanding the complaint contains an allegation of nonpayment and the answer denies it. *Esbensen v. Hover*, 467.

8. LIBEL.—The publication of words concerning merchants and traders which impute to them insolvency, financial difficulties or embarrassment, dishonesty or fraud, are actionable in themselves, without the necessity of alleging or proving special damages. *McKenzie v. Denver Times Publishing Co.*, 554.

9. SAME.—The publication of the words "Business Changes—McKenzie Lumber Company, Denver, Attached," is libelous *per se*. *Ib.*

10. SAME.—When the words published explain themselves, an innuendo is unnecessary. *Ib.*

11. **MECHANIC'S LIEN.**—To entitle a plaintiff to maintain a suit to foreclose a mechanic's lien he must, in his complaint, allege everything essential to the existence and establishment of his claim, and by allegations—both specific and general—bring himself literally within the terms of the statute. *Arkansas River L. R. & C. Co. v. Flinn*, 381.

12. **SAME.**—The complaint of a subcontractor to foreclose a mechanic's lien which fails to state that, at the time the plaintiff furnished the materials, no payments had been made by the owner to the contractor, but which contains averments implying that the owner is indebted to the contractor, is not subject to demurrer for a failure to state facts sufficient to constitute a cause of action. *Ditto v. Jackson*, 281.

13. **SAME.**—While the statute giving liens to mechanics and others should be liberally construed in favor of those entitled to invoke it, such facts should be stated in the complaint as show a full compliance with its provisions, and that the plaintiff has a claim that he has a legal right to enforce. *Hanna v. Colo. Savings Bank*, 28.

14. **PAYMENT.**—Where the facts constituting the cause of action for goods sold and delivered are stated in the complaint, together with an allegation of nonpayment, proof of payment is inadmissible unless it be specially pleaded. A denial will not suffice. *Esbensen v. Hover*, 467.

15. **PARTNERS.**—A complaint in an action against a firm, which alleges a distinct and independent indebtedness against each member thereof, does not state a cause of action. *Faust v. Smith*, 503.

16. **QUIETING TITLE.**—It is not incumbent upon the plaintiff in an action to quiet title to set forth in the complaint the claim or estate asserted by the defendant, the nature of the claim, or the facts which demonstrate its invalidity. *Amter v. Conlon*, 185.

17. **SAME.**—An allegation in such a complaint that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate and interest which he claims. *Ib.*

18. **REPETITION.**—The code prohibits unnecessary repetition, but does not prohibit repetition entirely. *Manders v. Craft*, 236.

19. **SAME.**—A motion to compel the plaintiff to elect upon which of two counts in a complaint for the same cause of action he will proceed, is addressed to the discretion of the court. *Ib.*

20. **STATUTE OF FRAUDS.**—The statute of frauds, if relied upon in defense, must be specially pleaded. *Benjamin v. Mattler*, 227.

21. **WATER RIGHTS.**—A complaint by a ditch company for itself and on behalf of its stockholders and the users of water from its ditch, in an action to restrain the wrongful diversion of water, should state the names of the users of water, the date of their appropriations, the amount of land for which the water is needed, and all facts necessary to show valid prior appropriations which have not been waived or abandoned. *Farmers' Ind. Ditch Co. v. Agricultural Ditch Co.*, 255.

PRACTICE IN CIVIL ACTIONS:

1. ADMINISTRATORS.—When an administrator asserts a claim which in anywise tends to diminish the estate, he should procure the appointment of a representative of his trust. *Fetta v. Vandevier*, 419.

2. AMENDMENTS.—The granting of leave to amend pleadings is entirely discretionary with the trial court, and, unless that discretion has been abused, appellate courts will not interfere. *Buno v. Gomer*, 456.

3. SAME.—Where a party desires to amend his pleadings by withdrawing a damaging admission, the application for leave to do so should be made the instant the error is discovered, and a broad, substantial showing of mistake is essential to entitle him to relief in the premises. *Ib.*

4. SAME.—A court has inherent power to amend its record *nunc pro tunc*, so as to make it express what was done at the time. *Breene v. Booth*, 470.

5. SAME. Clerical errors may be corrected by the trial court after a cause has been appealed, and such corrections may be brought into the appellate court by supplemental transcript and be there considered as a part of the original record. This is not permitted, however, where the character of the judgment is essentially changed or a new and different judgment substituted. *Ib.*

6. SAME.—The right to amend a complaint, even after leave is granted, is limited to an accurate and correct expression of a cause of action which theretofore had been inaccurately or insufficiently expressed. *Rockwell v. Holcomb*, 1.

7. ATTACHMENT.—There must be a finding of the facts alleged as the basis of the attachment, and a formal entry declaring them to exist, in order to entitle the plaintiff to judgment for a debt not due. *Woods v. Tanquary*, 515.

8. SAME.—The issue formed by the traverse of the grounds of the attachment must be tried by jury, unless that mode of trial be waived by the parties. *Ib.*

9. SAME.—When attachment proceedings have been instituted, and a traverse has been filed, it is not error to submit the issue to the jury for a separate finding. *Taylor v. Buckley*, 79.

10. CERTIORARI—A petition to remove a cause from a justice of the peace, which does not show that the judgment was not the result of negligence, and that it was not in the power of the petitioner to take an appeal in the ordinary way, is insufficient. *Wood v. Lake*, 284.

11. SAME.—*Certiorari* does not lie to the county court touching a matter within its jurisdiction. *People v. The County Court*, 425.

12. CONSOLIDATION OF ACTIONS.—When actions are pending between the same parties upon different causes which might have been joined, the court may order them consolidated and tried as one suit. *Putnam v. Lyon*, 144.

13. COUNTERCLAIM.—A defendant in an action in which a writ of at-

tachment has been issued and levied cannot set up a counterclaim for damages sustained by reason of an excessive levy under the writ. *Esbensen v. Hover*, 467.

14. **IMMATERIAL ERROR.**—Where under the pleadings the only issue to be tried was as to what costs were properly taxable against the sureties on a recognizance, they will not be heard to complain that the judgment was only for the amount of such costs and for less than the amount of their bond. *Ayres v. The People*, 117.

15. **SAME.**—Although an instruction ought not to have been given, yet, when it appears from the verdict that it occasioned no injury, it will be regarded as harmless error. *McClellan v. Hurdle*, 430.

16. **ERROR, WHEN CURED.**—After the overruling of a motion for a nonsuit, the error is obviated by evidence of the party in his own behalf, which supplies the defect existing in that of the plaintiff. *Woodbury v. Hinckley*, 210.

17. **GARNISHMENT.**—In order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, it is essential that there be service of process, or its equivalent, and he will not be bound by an independent submission of his rights by his debtor. *Rice v. American Nat. Bank*, 81.

18. **SAME.**—A valid conditional judgment is a condition precedent to the issuance of a *scire facias* against a garnishee. *Ib.*

19. **SAME.**—The authority to institute garnishee proceedings is entirely statutory, and, unless the requirements of the statute are complied with, the proceedings cannot be sustained. *Ib.*

20. **JOINDER OF CAUSES OF ACTION.**—Several causes of action which do not affect the parties in the same character and capacity may not be united in the same complaint. *Faust v. Smith*, 505.

21. **JUSTICE'S COURT.**—The provisions of the statute requiring the summons issued by a justice of the peace to specify the place, day and hour at which the party summoned must appear before him, are mandatory and must be strictly pursued. *Rice v. American Nat. Bank*, 81.

22. **PROCESS.**—Service of process from a justice's court cannot, under the statute, be made beyond the county, and the acceptance of service which shows that it was made outside of the county thereby shows that it was made where the process had no legal force. *Ib.*

23. **SAME.**—Service of process, requiring an appearance before a justice of the peace at an impossible date, confers no jurisdiction over the person served, and a judgment based upon such service is void. *Ib.*

24. **JURISDICTION.**—The day and hour fixed in the summons for its return is the time when the justice's jurisdiction of the action attaches, and not when he issues the writ. *Ib.*

25. **SAME.**—Whenever the act regulating the jurisdiction of justices of the peace provides the remedies when a litigant's right are not respected by the magistrate, such remedies are exclusive. *Wood v. Lake*, 284.

26. **SAME.**—The amount indorsed upon the summons issued by the justice of the peace as the amount of the plaintiff's claim concludes the plaintiff as to the amount of his recovery, unless in some legal and recognized manner it be changed. *Meyer v. Helland*, 536.

27. **SAME.**—It is erroneous to enter judgment in a case on appeal from a justice of the peace in excess of the amount indorsed upon the back of the summons. *Ib.*

28. **JUDGMENT ON THE PLEADINGS.**—Where the facts constituting a cause of action are specially admitted by the answer, a judgment may be entered against the defendant on the pleadings, notwithstanding the complaint contains an allegation of nonpayment and the answer denies it. *Esbensen v. Hover*, 467.

29. **JURY.**—Either party to an action pending in the county court of a county of the first class is entitled to a trial by jury without advancing the fees therefor. *Woods v. Tanquary*, 515.

30. **SAME.**—Where the facts show negligence on part of the plaintiff contributing to the accident, the case may be withdrawn from the jury. *Mau v. Morse*, 359.

31. **SAME.**—Where there is no evidence in the case bringing it within the statute allowing exemplary damages, it is error to submit the question to the jury. *Eisenhart v. Ordean*, 162.

32. **NEGLIGENCE.**—The question of negligence is a mixed one of law and fact. Where the facts are disputed or of doubtful character, the question must be submitted to the jury under instructions; but where there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, it is purely one of law. *Mau v. Morse*, 359.

33. **SAME.**—If the complaint on its face shows clearly, defined and palpable negligence on the part of the person injured contributing to the injury, no cause of action is stated, and it is proper to demur. *Ib.*

34. **CONTRIBUTORY NEGLIGENCE.**—The question of negligence is a mixed one of law and fact, and when a case is merely one of negligence against negligence, if from the entire evidence it clearly appears that the injured party acted otherwise than as a man of ordinary prudence, and was guilty of negligence contributing to the injury, the question becomes one of law and may be determined by the court without submitting it to the jury. *Denver etc. Transit Co. v. Dwyer*, 408.

35. **SAME.**—Notwithstanding a plaintiff may have been guilty of contributory negligence, yet if the defendant, with knowledge of his exposed condition, failed to exercise reasonable care and prudence to avoid the consequences of his negligence, he may nevertheless recover. *Ib.*

36. **NEW TRIAL.**—Newly discovered evidence going only to impeach the credit or character of a witness, is not a sufficient ground for a new trial. *Fist v. Fist*, 273.

37. **OBJECTIONS.**—Where the guardian hesitates or fails in the performance of his duty, the court will defend the minor's rights. *Appel-*

late courts are not relieved from the general duty laid on all other tribunals to conserve the interests of minors submitted to their consideration. *Fetta v. Vandevier*, 419.

38. ORDINANCES.—An action for the violation of a city ordinance may be commenced by ordinary summons without any form of pleading, but where a warrant issues in the first instance for the arrest of the offender it must be upon affidavit charging a violation of the ordinance. *Miller v. City of Colo. Springs*, 309.

39. SAME.—A complaint for violation of city ordinance which states the number of the section and title of ordinance violated, together with the date of its passage, is sufficient without setting forth the section or ordinance in full, or the substance thereof. *Ib.*

40. SAME.—The specification in the affidavit of the particular manner in which the ordinance was violated is a limitation upon a general charge of violating the ordinance, and the proofs must be confined to the specific offense. *Ib.*

41. PARTIES.—A person with whom or in whose name a contract has been made for the benefit of another may maintain an action thereon in his own name. *Rockwell v. Holcomb*, 1.

42. SAME.—At common law whenever a contract, whether written or verbal, was made with two or more persons, their legal interest was joint, and all obligees, covenantees or promisees, if living, were required to join as plaintiffs, but under section 12 of the Code, where parties jointly interested refuse to join as plaintiffs, they may under some circumstances be made defendants. *Goddard v. Decker*, 198.

43. PAYMENT.—Where the facts constituting the cause of action for goods sold and delivered are stated in the complaint, together with an allegation of nonpayment, proof of payment is inadmissible unless it be specially pleaded. A denial will not suffice. *Esbensen v. Hover*, 467.

44. PENDENCY OF ANOTHER ACTION.—When two actions are commenced upon the same cause, the remedy of the defendant, if he would avoid the vexation of two suits for the same thing, is to plead the pendency of the first in abatement of the second. *Putnam v. Lyon*, 144.

45. PRESUMPTION.—Where a defendant neglected to go upon the stand and make clear by his own denials his want of connection with a purchase, the court is entirely warranted in concluding even from slight testimony the existence of those facts which would render him liable for the price of that of which he had received the benefit. *McDonald v. McLeod*, 344.

46. STATUTORY ACTIONS.—The prosecution must show in an action under sec. 3957, Mill's Ann. Stats., that some of the defendant's employees were legally liable to a road tax, otherwise no violation of the statute is established. *Pitkin County v. Aspen M. & S. Co.*, 223.

47. SAME.—To entitle a settler upon the public lands of the United States to maintain any of the actions mentioned in section 8 of chap. 90, Gen. Stats., he is required, as conditions precedent, to have his claim

marked out so that the boundaries thereof may be readily traced and the extent of such claim easily known, and to be in actual occupancy of the claim or to have made improvements thereon to the value of one hundred dollars. *Martin v. Pittman*, 220.

48. SAME.—A statutory action cannot be maintained, except by showing a strict compliance with the requirements of the statute. *Ib.*

49. SAME.—Both parties having regarded and treated this action as one arising under the statute, and there being no evidence to the contrary, it is considered as such by the court. *Ib.*

50. STIPULATION.—The agreed statement upon which the cause was submitted contained a copy of a contract which lacked sundry indorsements on the original. It was agreed that "when said contract is obtained, any and all indorsements, writings, figures, etc., thereon, shall be copied on the back of Exhibit A and become a part thereof." When the original was produced there appeared on its face the words, "Canceled by substitution of deed to property," and the defendant asked leave to so change what purported to be a copy as to make it conform to the original. Held, leave should have been granted. *Keator v. Colo. Coal & I. D. Co.*, 188.

51. SURPRISE.—A party will not be heard to claim that he was surprised by, and for that reason unprepared to meet, the testimony of his adversary as to facts which were specially pleaded. *Fist v. Fist*, 273.

52. VERDICT.—It is discretionary with the jury to render a general or special verdict in an action for the recovery of money only, or of specific property. In such cases the court has no power to order special findings. *Meyers v. Hart*, 392.

53. SAME.—A verdict which is so clearly against an overwhelming weight of testimony that, if not willfully wrong, it could have resulted only from misapprehension or mistake of the law, should be set aside. *Lawrence v. Weir*, 401.

54. SAME.—Special findings in a verdict control general findings, and judgment should be entered in conformity with the facts thus established. *Rio Grande Southern R. R. Co. v. Deasey*, 196.

55. WAIVER OF ERROR.—Taking leave to amend a complaint after a demurrer thereto has been sustained, is a waiver of the right to assign error upon the order sustaining the demurrer. *Rockwell v. Holcomb*, 1.

56. WAIVER OF OBJECTIONS.—An objection on the ground of misjoinder must be made in apt time in the trial court. It will not be considered if made on appeal for the first time. *Moore v. Vickers*, 443.

57. SAME.—Objection on the ground of misjoinder of cause of action must be taken advantage of by demurrer if the defect be apparent on the face of the complaint, and by answer, if not so apparent; otherwise it is deemed waived. *Keys v. Morrison*, 441.

58. WITNESS.—A creditor of an estate who has intervened in an action by the administrator against the heir, and who is interested in the success of the latter, has a right to object to testimony by the plaintiff in his own behalf. *Fettu v. Vandevier*, 419.

PRESUMPTIONS:

1. **EVIDENCE.**—It being in the power of a railroad company to ascertain whether or not it had received goods for shipment, it is presumed to have ascertained that fact, and its failure to deny—except by way of answer to the complaint—that the goods were so delivered, is evidence of some weight that it had received them. *Union Pac. Ry. Co. v. Hepner*, 313.

2. **SAME.**—A lot of goods shipped together and embraced in the same way-bill, part of which were delivered to consignee, and part not, raises the presumption that the entire lot was received by the company. *Ib.*

3. **PAYMENT.**—A presumption of payment of commercial paper never arises from lapse of time unless it be equivalent to the period prescribed by the statute of limitations. *Jones v. Henshall*, 448.

4. **REGULARITY.**—Error will not be presumed. Unless error is shown, the presumption is in favor of the regularity of the judgment of the court below. *Reddicker v. Lavinsky*, 159.

5. **STATEMENTS.**—The statements contained in letters written or indorsements and memoranda made upon freight or expense bill, by agents of railroad company, in the course of search for goods lost in transit, and having reference to the search, are the statements of the company, and it is bound by all the inferences which legitimately result therefrom. *Union Pac. Ry. Co. v. Hepner*, 313.

PRINCIPAL AND AGENT: See **AGENTS AND AGENCY**.

PRINCIPAL AND SURETY:

INJUNCTION BOND.—An action lies upon an undertaking in injunction against the principal and surety or sureties, without previous adjudication awarding damages against the principal. *Lynch v. Metcalf*, 131.

PROOF:

1. **FRAUD.**—An action for damages, as for deceit, is maintainable upon an executed contract. In order to prove such fraud as will sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff. *Barker v. Nichols*, 25.

2. **QUANTUM OF PROOF.**—The rule is inflexible that, in order to take the case out of the statute of frauds, it is essential that the contract should be established by clear, definite and conclusive proofs. *Fetta v. Vandevier*, 419.

PROCESS: See **GARNISHMENT AND JUSTICES OF THE PEACE**.

PUBLIC LANDS:

1. **ACTIONS—CONDITIONS PRECEDENT.**—To entitle a settler upon the public lands of the United States to maintain any of the actions mentioned in section 8 of chap. 90, Gen. Stat., he is required, as conditions precedent, to have his claim marked out so that the boundaries thereof may be readily traced and the extent of such claim easily known, and to be in actual occupancy of the claim or to have made improvements thereon to the value of one hundred dollars. *Martin v. Pittman*, 220.

2. **MINING LAW.**—If a locator of a mining claim permits an adjoining claimant to obtain a patent for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he loses title to whatever territory is embraced within the limits of his claim. *Miller v. Girard*, 278.

3. **TOWN-SITE.**—The title vested in the county judge by patent, under § 2387 U. S. Rev. Stats., is only in trust for the occupants of the land. Occupancy of some sort must be shown as a condition precedent to obtain a conveyance. *Mitchell v. Arkell*, 253.

QUIETING TITLE:

1. **PLEADING.**—It is not incumbent upon the plaintiff in an action to quiet title to set forth in the complaint the claim or estate asserted by the defendant, the nature of the claim, or the facts which demonstrate its invalidity. *Amter v. Conlon*, 185.

2. **SAME.**—An allegation in such a complaint that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate and interest which he claims. *Ib.*

RATIFICATION:

AGENCY.—A party may not accept what has been done for him by one who is not his agent, and deny the power of the individual to act. If he adopts the acts by accepting the benefits of the transaction, he will be charged with a responsibility for the things done. *Markell v. Matthews*, 49.

REAL ESTATE AGENTS: See **BROKERS.**

RECEIPTS:

1. **EXPLANATION AND IMPEACHMENT.**—A receipt, even when it purports to be in full, is at all times liable to explanation and impeachment. *U. P. D. & G. Ry. Co. v. McCarthy*, 530.

2. **SAME.**—A receipt in full by the assignee of a claim for collection is not conclusive in favor of the party to whom it is given, nor against the assignor, especially when the amount claimed to be due upon the account exceeds the amount paid. *Moore v. Vickers*, 443.

RECEIVERS:

1. **RECEIVER.**—A receiver is a trustee and an officer of the court, is charged with the duty of managing the estate intrusted to his care with due regard to the rights of the litigants, and in such manner as, according to his best judgment, to preserve what has been committed to his care and bring it into court. *Eskridge v. Rushworth*, 562.

2. **SAME.**—Ordinarily a receiver would have no right to carry on a mercantile business of which he had been put in charge, otherwise than to dispose of the property turned over to him for the best price possible, and produce the funds for the benefit of those entitled to them. *Ib.*

3. **SAME.**—The litigants are concluded as to what a receiver does under an order entered by consent, providing his acts are brought within the scope of the order, and he is not by evidence *aliunde* shown to have been guilty of misconduct. *Ib.*

4. **SAME.**—Where an order appointing a receiver provided that he might continue the business of a certain store and “replenish the stock therein from the moneys received until said stock can be sold at a good and reasonable price, that none of the goods should be sold at public auction, but be disposed of in the course of trade,” he is fully authorized to carry on the business of the store, and buy whatever in his judgment, reasonably and prudently exercised, should be essential to the execution of the terms and evident purpose of the order. *Ib.*

RECOGNIZANCE:

1. **SURETIES ON RECOGNIZANCE.**—Sureties on a recognizance, who desire to avail themselves of the provisions of sec. 969, Gen. Stats., in order to escape liability for the full amount of their bond, must pay the expenses incurred by the county in procuring the return of their principal from another state upon a requisition. *Ayres v. The People*, 117.

2. **COSTS.**—The term “costs,” as used in sec. 969, Gen. Stats., includes whatever the law officers may legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial. *Ib.*

3. **EVIDENCE.**—Evidence is admissible in an action on a recognizance which tends to show the circumstances under which the officer went to another state after the principal, and to demonstrate that his going was not the result of a contract between him and the sureties, but an execution of the law under an arrangement with the governing body of the county. *Ib.*

REDEMPTION:

VOID SALE.—One who was intended to be made trustee, but by mistake was not so made, takes no title under the deed of trust and is not invested with any powers as trustee. A sale by him is void, and does not preclude the trustor of his right to redeem. *McMeel v. O'Connor*, 113.

RESCISSION:

1. **WHEN DECREED.**—The court will decree deeds, leases or contracts to be canceled, when enforcing such instruments or agreements would be inequitable or unjust. *Boyes v. Green Mountain F. T. & I. Co.*, 295.

2. **WHEN NOT DECREED.**—A decree of rescission will not be entered, if at the time of the hearing the plaintiff is able to remedy the defect complained of and make the title which he undertook to convey. *Godding v. Decker*, 198.

3. **DISCRETIONARY.**—The rescission or cancellation of contracts or deed and specific performance are not matters of absolute right, but matters resting in the sound discretion of the court. *Boyes v. Green Mountain F. T. & I. Co.*, 295.

4. **ELECTION.**—Generally, where one fails to perform his part of a

contract or disables himself from performing it, the other party may treat the contract as rescinded, and may elect either to sue for damages or to bring suit for a cancellation. *Ib.*

5. EVIDENCE.—When a rescission of a prospecting partnership contract is relied upon, the circumstances must show an absolute abandonment of the contract as to future enterprises. Proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement. *Abbott v. Smith*, 264.

6. RESTORATION.—It is generally held that a party may not rescind a contract without returning or offering to return the fruits of the agreement, and restoring so far as he may the other to his possession. *Godding v. Decker*, 198.

7. TITLE.—That the vendor holds only a final receipt, and not a patent for the land, is not a defect of which the purchaser can complain. *Ib.*

RES JUDICATA:

1. JUDGMENT CONCLUSIVE.—A valid judgment by a court of competent jurisdiction between the same parties is conclusive, except where by review, an appeal, or rehearing in some form, is allowed and regulated by law. No man is to be twice vexed with the same controversy. *Gordon v. Johnson*, 139.

2. SAME.—It is no objection that the former suit embraced more subjects of controversy, or more matter than the present; if the entire subject of the present controversy was embraced in it, it is sufficient,—it is *res judicata*. *Ib.*

3. DECREE, WHEN NOT CONCLUSIVE.—An adjudication of the rights of an appropriator of water in a certain water district cannot conclude the rights of individuals who were not parties to the proceeding. *Farmer's Independent Ditch Co. v. Agricultural Ditch Co.*, 255.

4. DISMISSAL.—A voluntary dismissal of an intervention, without any agreement of the parties or other circumstances tending to show that such dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action by the intervenor. *Martin v. McCarthy*, 37.

5. SAME.—A decree, dismissing a bill in equity after hearing, is a bar to a subsequent bill between the same parties for the same subject-matter, unless it appears by the record that the dismissal was without prejudice, or otherwise not upon the merits. *Gordon v. Johnson*, 139.

6. NONSUIT.—A voluntary nonsuit taken by the plaintiff at any time before trial does not estop him to bring a new action. *Martin v. McCarthy*, 37.

RIGHT OF WAY:

1. GRANT OF RIGHT OF WAY.—Sec. 2477, U. S. Rev. St., grants the right of way for the construction of highways over public lands not reserved to public uses. *Estes Park Tollroad Co. v. Edwards*, 74.

2. GRANT, HOW ACCEPTED.—The construction of a highway over public lands is an acceptance of the grant, and is all that is necessary to pass

the government title to the right of way, subject to defeasance in case of abandonment. *Ib.*

3. **PROPERTY.**—After the grant takes effect, the way so appropriated ceases to be a portion of the public domain, and becomes the property of the road company. *Ib.*

4. **TAXATION.**—The roadbed and right of way of a tollroad company is property and subject to taxation. *Ib.*

SALES: See **STATUTE OF FRAUDS.**

SERVICE OF PROCESS:

1. **CONSTRUCTIVE SERVICE.**—A decree of divorce based upon constructive service is void unless the record shows a strict compliance with all the statutory requirements. *Roberts v. Roberts*, 6.

2. **MAILING COPY OF SUMMONS.**—The record must show a compliance with the statute respecting the mailing of a copy of the summons to the defendant to justify the entry of a judgment. *Ib.*

3. **PRACTICE.**—Parol proof that the defendant has actual knowledge of the pendency of the action will not be considered on the hearing of his motion to set aside the judgment, because of the failure to mail him a copy of the summons, as required by law. *Ib.*

SHERIFF:

DUTY.—A sheriff to whom a prisoner has been committed from another county in which there is no jail, is under imperative obligation to receive him. *Montezuma County v. San Miguel County*, 137.

SPECIFIC PERFORMANCE:

DEFENSE.—The fact that a contract depends upon a condition precedent which has not been performed, is always a complete defense to a suit for its enforcement. *Boyes v. Green Mountain F. T. & I. Co.*, 295.

STATE TREASURER:

POWERS AND DUTIES.—The state treasurer is clothed with the right and it is his duty to investigate the legality of every warrant before payment. *Carlile v. Hurd*, 11.

STATE VETERINARY SURGEON:

1. **EXECUTIVE.**—By the amendatory act of April 1, 1891, the power to appoint the state veterinary surgeon is vested in the governor, subject to the approval of the senate. *Lamb v. The People*, 106.

2. **STATE VETERINARY SANITARY BOARD.**—The state veterinary sanitary board has no authority to pass upon the qualifications of the state veterinary surgeon, and no power to remove him from office. *Ib.*

STATUTORY CONSTRUCTION:

1. **STATUTORY ACTION.**—To entitle a settler upon the public lands of the United States to maintain any of the actions mentioned in section 8 of chap. 90, Genl. Stats., he is required, as conditions precedent, to have his claim marked out so that the boundaries thereof may be readily traced and the extent of such claim easily known, and to be in the actual

occupancy of the claim or to have made improvements thereon to the value of one hundred dollars. *Martin v. Pittman*, 220.

2. APPEALS.—The statute [Mill's Ann. Stats., sec. 4444], providing that a municipal corporation may take an appeal and have a writ of error made a *supersedeas* without bond, has no reference to an appeal from the county to the district court. *Pueblo v. Jackson*, 522.

3. COMMERCIAL PAPER.—In order to bring a claim within the provisions of sec. 103, Gen. Stats., it must appear that it is an instrument in writing acknowledging an indebtedness and promising payment, which may be made either in money or personal property. *Reddicker v. Lavinsky*, 159.

4. DITCHES.—The provisions of section 1716, Gen. Stats., that no tract of improved or occupied land shall, without the written consent of the owner, be subjected to the burden of two or more irrigating ditches, when, etc., are for the benefit of the landowner, and cannot be invoked by rival ditch companies. *San Luis L. C. & I. Co. v. Kenilworth C. Co.*, 244.

5. EXECUTIVE.—By the amendatory act of April 1, 1891, the power to appoint this state veterinary surgeon is vested in the governor, subject to the approval of the senate. *Lamb v. The People*, 106.

6. MECHANIC'S LIEN.—Lien statutes being in derogation of the common law are to be strictly construed. *Arkansas River L. & R. & C. Co. v. Flinn*, 381.

7. SAME.—A party who claims a mechanic's lien is required to file his notice in the county where the property is situate, and, where it extends into or through several counties, the notice must be filed in each county. *Ib.*

8. SAME.—To entitle a plaintiff to maintain a suit to foreclose a mechanic's lien he must, in his complaint, allege everything essential to the existence and establishment of his claim, and by allegations—both specific and general—bring himself literally within the terms of the statute. *Ib.*

9. SAME.—While the statute giving liens to mechanics and others should be liberally construed in favor of those entitled to invoke it, such facts should be stated in the complaint as show a full compliance with its provisions and that the plaintiff has a claim that he has a legal right to enforce. *Hanna v. Colo. Savings Bank*, 28.

10. NEW POWER.—When a statute gives a new power and at the same time provides the means of executing it, the power can be executed in no other way. *Prowers County v. Pueblo & A. V. R. R. Co.*, 398.

11. PAUPER.—The intention of the legislature in enacting sec. 2537, Gen. Stat., was to punish any person who, knowingly and intentionally, caused a pauper to be taken from the county where domiciled and transported to another, with the knowledge and intention of relieving the county of domicile from a charge of support, and making the person a charge upon the other county. *Pitkin County v. Law*, 328.

12. **SAME.**—In order to warrant conviction under this statute it must appear beyond controversy that the person was a pauper within the legal definition of the word, had legal domicile in the county from which the removal was made, and not in the county to which he was taken or sent, and a knowledge of the facts by the person charged from which the intention, if not expressed, could legally be implied. *Ib.*

13. **PENAL STATUTES.**—A penal statute must be strictly construed. *Ib.*

14. **RECOGNIZANCE.**—Sureties on a recognizance, who desire to avail themselves of the provisions of sec. 969, Gen. Stats., in order to escape liability for the full amount of their bond, must pay the expenses incurred by the county in procuring the return of their principal from another state upon a requisition. *Ayres v. The People*, 117.

15. **SAME.**—The term "costs," as used in sec. 969, Gen. Stats., includes whatever the law officers may legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial. *Ib.*

16. **SUPERINTENDENT OF INSURANCE.**—The statute which invests the superintendent of insurance with authority to examine and proceed against insurance companies has no extra territorial force. *Carlile v. Hurd*, 11.

17. **TAXATION.**—The power to levy a special tax in a school district of the third class is by statute vested in the electors thereof, and cannot be exercised by the board of directors. *Prowers County v. Pueblo & A. V. R. R. Co.*, 398.

18. **SAME.**—The words "who may be" occurring in a statute, providing that all persons, etc., shall, on application of the road overseer, furnish the names of the persons in their employment, "who are or may be liable to the payment of a road tax," etc., can only be construed as meaning in the future, and impose an impossibility. *Pitkin County v. Aspen M. & S. Co.*, 223.

STATUTE OF FRAUDS:

1. **CHATTEL MORTGAGE.**—The giving and recording of a chattel mortgage by the vendee of chattels to whom possession thereof was not given, does not take the sale out of the operation of the statute. *Anders v. Barton*, 324.

2. **CREDITORS.**—By the statute the term "creditors" includes all persons who are creditors of the vendor or assignor at any time whilst the goods and chattels sold remain in his possession or control. *Rizer v. McCarthy*, 348.

3. **PLEADING.**—The statute of frauds, if relied upon in defense, must be specially pleaded. *Benjamin v. Mattler*, 227.

4. **SALES OF CHATTELS.**—Every sale made by a vendor of chattels in his possession, or under his control, unless the same be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things sold, is conclusively presumed to be fraudulent and void. *Springer v. Kreeger*, 487.

5. **SAME.**—The vendee must take actual possession, and the possession must be open, notorious and unequivocal, so as to apprise the community, or those accustomed to deal with the party, that the goods have changed hands and that the title has passed. *Ib.*

6. **SAME.**—When the subject of the sale does not reasonably admit of an actual delivery, it is sufficient if the vendee assume actual control and dominion of the property so as to reasonably indicate to all concerned the change of ownership. *Ib.*

7. **SAME.**—A sale of chattels, not followed by an actual and continued change of possession, is void as against the creditors of the vendor. *Anders v. Barton*, 324.

8. **SAME.**—A sale of chattels, not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is fraudulent and void, as against creditors of the vendor. *Rizer v. McCarthy*, 348.

9. **SAME.**—It is entirely immaterial how many subsequent sales were made or in what manner, so long as the possession of the original vendor remained undisturbed. All such sales are void as to his creditors. *Ib.*

10. **SAME.**—A sale of chattels unaccompanied by an immediate delivery, and an actual, open and unequivocal change of possession, exclusive of the vendor, is void as against creditors. *Donovan v. Gathe*, 151.

STOPPAGE IN TRANSITU :

1. **STOPPAGE IN TRANSITU.**—A vendor of goods sold on credit has a right to stop the same and resume possession thereof while they are in intermediate hands, in case the vendee becomes insolvent before acquiring actual possession thereof. *Weber v. Baessler*, 459.

2. **SAME.**—Goods are regarded as being in transit until they have passed out of the possession of every intermediate agency; and until the transit has been determined by an actual delivery to the vendee or consignee the right of the vendor to reclaim the goods is unimpaired by any seizure thereof at the suit of creditors of the vendee. *Ib.*

3. **SAME.**—A delivery of the goods to an agent, whether of the vendor or vendee, who holds them merely for the purpose of transmission to the vendee, is not a final delivery such as determines the right of stoppage. *Ib.*

4. **SAME.**—A delivery of the goods by an intermediate agent to a stranger, as to a sheriff holding a writ of attachment against the vendee, does not determine the right of stoppage. *Ib.*

STREETS: See **MUNICIPAL CORPORATIONS.**

SUPERINTENDENT OF INSURANCE.

1. **POWERS OF.**—The statute which invests the superintendent of insurance with authority to examine and proceed against insurance companies has no extraterritorial force. *Carlile v. Hurd*, 11.

2. **SAME.**—The superintendent of insurance, having no power to act outside of the state, has no power to disburse the public money while

visiting other states,—regardless of the purpose for which he went. Such expenditures do not constitute legitimate claims against the state. *Ib.*

TAXES AND TAXATION:

1. RIGHT OF WAY SUBJECT TO.—The roadbed and right of way of a tollroad company is property and subject to taxation. *Estes Park Tollroad Co. v. Edwards*, 74.

2. SCHOOL TAXES.—The power to levy a special tax in a school district of the third class is by statute vested in the electors thereof, and cannot be exercised by the board of directors. *Prowers County v. Pueblo & A. V. R. R. Co.*, 398.

3. TAXES, AS BETWEEN GRANTOR AND GRANTEE.—The statute provides that as to all lands conveyed between the first day of January and the first day of May, the grantee must, in the absence of express agreement, pay the taxes which stand assessed against the property. A payment of such taxes by the grantor, under such circumstances, gives no right of action against the grantee. *Keator v. Colo. Coal & Iron D. Co.* 188.

TOWN SITES:

TITLE.—The title vested in the county judge by patent under § 2387 U. S. Rev. Stats. is only in trust for the occupants of the land. Occupancy of some sort must be shown as a condition precedent to obtain a conveyance. *Mitchell v. Arkell*, 253.

TRUSTS AND TRUSTEES:

VOID SALE—REDEMPTION.—One who was intended to be made trustee, but by mistake was not so made, takes no title under the deed of trust and is not invested with any powers as trustee. A sale by him is void, and does not preclude the trustor of his right to redeem. *McMeel v. O'Connor*, 113.

UNDERTAKING: See INJUNCTION BOND.

VENDOR AND PURCHASER:

1. EXECUTORY AGREEMENT.—The vendee under an executory agreement to purchase real estate has a right to insist upon a marketable title—one without defects of which he could lawfully complain. *Godding v. Decker*, 198.

2. SAME.—That the vendor holds only a final receipt, and not a patent, for the land is not a defect of which the purchaser can complain. *Ib.*

3. RESCISSION.—A decree of rescission will not be entered, if at the time of the hearing the plaintiff is able to remedy the defect complained of and make the title which he undertook to convey. *Ib.*

4. SAME.—It is generally held that a party may not rescind a contract without returning or offering to return the fruits of the agreement, and restoring so far as he may the other to his possession. *Ib.*

5. **SUBSEQUENT PURCHASERS.**—Purchasers with notice of incumbrance are in no sense innocent, and, if they desire to exempt the property from the obligation of the incumbrance by proof that the paper it was executed to secure has been liquidated, the burden is upon them to show it. *Smith v. Stark*, 453.

6. **TAXES, AS BETWEEN GRANTOR AND GRANTEE.**—The statute provides that as to all lands conveyed between the first day of January and the first day of May, the grantee must, in the absence of express agreement, pay the taxes which stand assessed against the property. A payment of such taxes by the grantor, under such circumstances, gives no right of action against the grantee. *Keator v. Colo. Coal & Iron D. Co.*, 188.

VENUE:

1. **VENUE.**—An action is properly commenced in the county where the cause of action accrued. *Montezuma County v. San Miguel County*, 137.

2. **SAME.**—An action to recover on a money demand growing out of a contract between the parties shall be tried in the county in which the defendants or any of them shall reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county, subject to the power of the court, upon good cause shown, to change the place of trial. *Pearse v. Bordeaux*, 351.

3. **SAME.**—In such an action, service upon the defendant in a county other than that in which the action was commenced, does not give the court jurisdiction without the acquiescence of the defendant. Where an application, sufficient in form and uncontradicted, is made for a change of place of trial, the court has jurisdiction of the cause only for the purpose of ordering its removal to the proper county. *Ib.*

VERDICTS:

SPECIAL VERDICT.—It is discretionary with the jury to render a general or special verdict in an action for the recovery of money only, or of specific property. In such cases the court has no power to order special findings. *Meyers v. Hart*, 392.

WARRANTY:

1. **COVENANTS.**—A covenant against incumbrances is one *in præsenti*, and is broken at the time of the execution of the deed, if there be an outstanding valid lien which the grantee is compelled to discharge. *Fisk v. Cathcart*, 374.

2. **SAME.**—When an estate is conveyed subject to an incumbrance, the grantee takes an estate which draws to itself the right to enforce all covenants contained in the deed whereby it was transferred, or any other covenants contained in antecedent conveyances which run with the land. *Ib.*

3. **SAME.**—Where a conveyance is made subject to an incumbrance

but contains, with this exception, general covenants against incumbrances, and the estate passed is subsequently extinguished by proceedings under the excepted incumbrance, a remote grantee cannot, after extinguishment of his estate, maintain an action upon a breach of the covenant against incumbrances, notwithstanding he was compelled to expend money to remove a lien upon the premises while he held them. *Ib.*

4. IMPLIED WARRANTY.—In the sale of a chattel there is an implied warranty of the legal ownership of the vendor. A breach of such warranty constitutes a cause of action, but not until the vendee shall have been deprived of the chattel or shall have reimbursed his own vendee. *Myers v. Bowen*, 537.

5. SAME.—No intermediate covenantee can sue his covenantor until he himself shall have been compelled to pay damages upon his own warranty. *Ib.*

WAIVER:

1. WAIVER OF OBJECTIONS.—Objection on the ground of misjoinder of causes of action must be taken advantage of by demurrer, if the defect be apparent on the face of the complaint, and by answer, if not so apparent; otherwise it is deemed waived. *Keys v. Morrison*, 441.

2. SAME.—An objection on the ground of misjoinder must be made in apt time in the trial court. It will not be considered if made on appeal for the first time. *Moore v. Vickers*, 443.

3. SAME, NONE BY INFANT.—In a suit where a minor is concerned, nothing can be admitted against his interest. His representative should insist that no step be taken which shall be in any manner legitimately the subject of objection. *Fetta v. Vandevier*, 419.

WATER RIGHTS:

1. ABANDONMENT.—Upon abandonment of the construction of a proposed canal without intention of resuming, all incipient rights lapse and revert to the public, and are not thereafter capable of being sold or transferred. *Colorado Land & Water Co. v. Rocky Ford etc. Co.*, 545.

2. APPROPRIATION.—To constitute a legal appropriation the water must be applied within a reasonable time to some beneficial use; that is, the diversion ripens into a valid appropriation only when the water is utilized by the consumer. *Ib.*

3. SAME.—The true test of the appropriation of water is the successful application thereof to the beneficial use designed. *Cash v. Thornton*, 475.

4. SAME.—Section 6, art. 16 of the Constitution, which provides that "priority of appropriation shall give the better right, as between those using the water for the same purposes," applies to the respective rights of different parties, claiming the same interest adversely. *Bloom v. West*, 212.

5. APPURTENANCES, ARE NOT.—Water rights are not appurtenances. *Ib.*

6. CANAL COMPANIES—SUCCESSION.—A canal company may, while prosecuting its work of construction with proper diligence, sell and dispose of such rights as it may have, and the grantee may become a legal successor, but in order to become such it must succeed to the charter rights of the grantor, prosecute the enterprise under the same franchise and in accordance with the statement and certificate of its incorporation. *Colorado Land & Water Co. v. Rocky Ford etc. Co.*, 545.

7. DAMAGES.—A judgment for damages for the diversion of water can only be based upon the ownership or right of property in the water, and the wrongful invasion of that right. *Cash v. Thornton*, 475.

8. DITCHES.—While as a fact there may be but one ditch, yet there may be two distinct legal entities therein which have never merged or become identical. *Patterson v. Brown etc. Ditch Co.*, 511.

9. SAME.—Where a ditch is enlarged and extended by a new and different set of proprietors, the duty of keeping in repair the headgate and ditch to its original terminus is upon both sets of owners—the expense to be adjusted upon an equitable basis; but beyond this the first set of owners have no interest and no duty. *Ib.*

10. EVIDENCE.—As water rights are not appurtenances, proof of title to the land on which they have been used is not required in an action between the purchasers thereof to determine their respective rights; the extent of the land irrigated can only be regarded as data upon which an equitable division of the water may be based. *Bloom v. West*, 212.

1. PERCOLATING WATERS.—It is an invasion of the rights of a prior appropriator to divert water from a stream—surface or subterranean—by means of dams, wells or pumps, whereby the flow of water is diminished, notwithstanding such diversion is by the owner of land through which such water flows or percolates, and upon his own premises. *McClellan v. Hurdle*, 430.

12. PLEADING.—A complaint by a ditch company for itself and on behalf of its stockholders and the users of water from its ditch, in an action to restrain the wrongful diversion of water, should state the names of the users of water, the date of their appropriations, the amount of land for which the water is needed, and all facts necessary to show valid prior appropriations which have not been waived or abandoned. *Farmers Independent Ditch Co. v. Agricultural Ditch Co.* 255.

13. PROPERTY.—The right to the use of water for irrigating purposes is a right of property, the subject of ownership like any other property *Cash v. Thornton*, 475.

14. RELATION.—Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence the right relates to the time when the first step was taken to secure it. What is reasonable diligence is a question of fact depending upon the circumstances of each particular case. *Colo. Land & Water Co. v. Rocky Ford etc. Co.*, 545.

15. RIGHT OF APPROPRIATORS.—Prior appropriators of water are en-

titled to have the same flow unimpaired in quantity and without permanent or unreasonable deterioration in quality. *Cushman v. Highland Ditch Co.*, 437.

WITNESSES:

1. **COMPETENCY.**—The competency of a witness is not affected by the character of the testimony he may give. *Jones v. Henshall*, 448.

2. **SAME.**—In general, a party is absolutely incompetent to give evidence when he brings an action against an administrator or defends a suit brought by one. *Ib.*

3. **SAME.**—Generally, a party to an action is incompetent to testify on his own motion, or in his own behalf, when any person appears and defends as heir. *Fetta v. Vandevier*, 419.

4. **COMPENSATION—EXPERTS.**—A physician who attends as a witness in obedience to a subpoena may be compelled to express his opinions on hypothetical questions, or on general medical and toxicological subjects, as an ordinary witness is compelled to testify on questions of fact within his knowledge, and for the same statutory fees. *Larimer County v. Lee*, 177.

5. **SAME.**—An expert cannot be compelled to do a particular thing, as to analyze the contents of a stomach, or perform a *post mortem* operation, by the ordinary process of subpoena, nor for an ordinary witness fee. *Ib.*

6. **SAME.**—The district court has no inherent or other power to allow compensation in excess of statutory fees to experts to be called as witnesses in a criminal case. Such an order is not binding upon the county chargeable with the costs. *Ib.*

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